United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

PLEASE RETURN TO
RECORDS ROOM

76-7421

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 76-7421

ANTON PICINICH,

Plaintiff-Appellant,

against

CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP COMPANY, INC.,

Defendants-Appellees.

SKIBS A/S SAMUEL BAKKE,

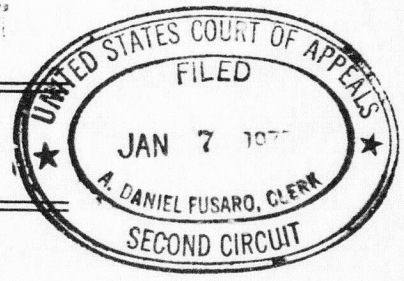
Defendant and Third-Party Plaintiff-Appellee,

against

JOHN W. McGRATH CORPORATION,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



VOLUME I

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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DIPLOMATE
AMERICAN BOARD OF
NEUROLOGICAL SURGERY

GERALD L. W OKUR, M.D., F.A.C.S.
MEDICAL ARTS BUILDING
8 CLIFTON PLACE
JERSEY CITY 4, N. J.

August 16, 1971

J. W. McGrath Corporation
21 West Street
New York, New York

re: Anton Picinich

Following is a summary of my neurosurgical consultation on the above patient at this office on August 5, 1971 per your request and the request of A. Zitani, Jr., M.D. of Hoboken, NJ

History was obtained from the patient through an interpreter. Patient stated on July 12, 1971 he fell 35 feet off a lighter ship and landed in the water. He was momentarily dazed but was rescued by someone throwing him a life preserver. He had general bruises and ecchymoses over the body and right side of the face. He was taken to St. Mary's Hospital where he received emergency treatment. Xrays were negative for fracture. Patient was no detained. He was then treated and seen by Dr. Zitani and treated by Dr. Zitani. As yet he has not returned to work.

Since the injury patient has multiple complaints. He complains of almost constant right sided headache with radiation to the occiput. He notes dizziness. He states he is nervous. He complains of inability and difficulty with sleep. He states his posterior neck region aches. His low back aches. His right hip aches. He notes aching in both shoulders and both legs. However he notes no diplopia, ataxia, difficulty in smell, taste, swallowing, hearing loss, motor or sensory abnormalities of the extremities.

PAST HISTORY: Negative.

NEUROLOGICAL EXAMINATION: Sensorium intact. No aphasia. Palpation and auscultation of the head reveals no thrill or bruit or any gross abnormalities of the head. Patient is well oriented. Neck is supple. Cranial nerves intact. Facial sensation and m otor power normal. Extra ocular movements well performed; no hemianopsia or nystagmus; pupils are round, regular, equal and react to light; funduscopic examination reveals no papilledema. Corneal reflexes intact. Hearing grossly normal via tuning fork. Tongue protrudes in the midline without abnormal tremor; soft palate retracts in the midline. Examination of the spine reveals moderate limitation of motion of the low back but no spasm, tenderness or deformity. Examination of the extremities reveals sensation and motor power intact. Reflexes equal and active; position and vibratory sense intact. No ataxia. Gait normal. Abdominal reflexes intact. No pathological toe signs. Romberg normal.

IMPRESSION: From the history patient incurred a contusion of the skull and multiple contusions of the body; objectively I find nothing organically neurologically. His complaints are purely subjective in nature. Suggest symptomatic treatment.

Gerald L. Winokur, M. D.

GLW/evn
enc.

CC: A. Zitani, Jr., M.D.
10 Church Towers
Hoboken, N.J.

Exhibit 1
- 18

FRED BROWN, PH. D.
CLINICAL PSYCHOLOGIST
1200 FIFTH AVENUE
NEW YORK, N. Y. 10029
TE 1-3611

September 26, 1975

McHugh, Heckman, Smith & Leonard
Eighty Pine Street
New York, N.Y. 10005

BEST COPY AVAILABLE

Re: Anton Picinich
Your File No. 1068

Dear Sirs:

Mr. Picinich phoned me approximately 45 minutes before the time set for his examination and asked for directions to my office, which I provided. He appears to have a minimal ability to express himself in English and to comprehend, but except for his use of the word "monster" in the Rorschach he gave no overt sign of understanding my remarks to the interpreter. He arrived ½ hour late for his appointment, but the interpreter, Mr. Stan Miland, had arrived on time and we had an opportunity to discuss the nature of the test battery and the procedures we would follow. Mr. Miland impressed me as a cultured gentleman and a sympathetic one. To the best of my knowledge he followed my instructions to the letter throug out administration of the test battery.

The following tests were utilized:

Portions of the WAIS comprising Comprehension, Arithmetic, Similarities, Digit Span, Digit Symbol, Block Design, and Object Assembly.
The Bender Gestalt Test and Recall.
TAT
Human Figure Drawings
Benton Visual Retention Test (Revised)
Hooper Visual Organization Test
Rorschach
Mini-Mult (short form of the MMPI).
Incomplete Sentences Test.

Mr. Picinich worked slowly and effortfully on the first of the tests, the Bender Gestalt, and complained that he was so nervous that he could not see. He was encouraged to try and replied that he was doing his best. Otherwise he made no spontaneous verbalizations and complied immediately with test instructions to the best of his ability even though it was evident that his posture was a self- disparaging one, the attitude of a man whose self-esteem has eroded.

The Bender designs he copied show many of the conventional signs of perceptual motor dysfunction involving a cerebral disorder. These comprise fragmentation, inability to copy angular designs, distortio

Exhibit 2
1C

and rotation. On the recall portion of the test he produced only two designs, one of them rotated 180 degrees. His retention is badly impaired and what he retains is susceptible to distortion.

None of the designs on the ten cards of the Benton, each exposed for 10 seconds, were recalled correctly. His productions included perseverations, inversions, and distortions as in the Bender. Normative data place him in the below 70 IQ range.

His human figure drawings are quite primitive and focus upon feelings of weakness, a sense of alienation, and depression. When asked for the sex of the initial figure he replied, "half man and half woman", an indication of confused sexual identification and role which has direct relevance to his sexual functioning. Parenthetically, there are no test indications anywhere in the battery of denial mechanisms, especially in view of his greatly diminished self-image and self-esteem. Denial, if present, would have suggested a better coping level than he shows.

The Hooper test was discontinued after he had failed the first six easy items. The test requires the testee to recognize pictures of objects when the pictures have been cut up and rearranged and to decide what it might be if it were put together. His failures were quite bizarre (Fish, "mouse"; Saw, "Won't help if I look longer"; Table, "couch"; Airplane, "legs"; Baseball, "vegetable"; Hammer, "To mow the wheat"), indicative of organic brain pathology and concurrent reality distortion.

Severe disability was encountered on the Wechsler Adult Intelligen Scale (WAIS), his scores not only dropping to zero but also reflecting cognitive and perceptual distortions of a bizarre nature. When asked what would be the thing for him to do if he found an envelope on the street that was sealed, addressed, and had a new stamp on it he replied that he would let it as it is. Queried on this reply, he said he would be afraid. Such a response indicates retreat from any kind of involvement and some paranoid tendencies. He thought people should pay taxes "In order that people could eat", and if he were the first person in a movie theater to notice smoke or fire he would not do anything because the smoke would obstruct his vision.

On Similarities hostile impulses were suggested by his statement that an axe and saw were alike because "an axe could be used to kill a man". For North - West he said "I see stars over there".

He was able only to repeat 2 digits forward and none backward, on the latter complaining that he could not get it into his head. As mentioned above, his retention is severely impaired, as is his concentration.

His performance on the nonverbal tests was characterized by gross distortions and concrete thinking. He failed both demonstrations of the Block Design Test, and on others inverted and fragmented the objects, his 180 degree rotations on Digit Symbol and Object Assembl accompanied by increasing perseverations.

He produced 16 responses on the Rorschach but the record is that of a tightly constricted man who does not exhibit any indications o

empathic reactivity or emotional relatedness. The content of the record indicates timidity, a need for protection and guidance, and feelings of isolation, the latter having a bearing upon his postulate alienation from his wife. This inference was borne out on other tests The Rorschach does not show those gross deviations from reality described previously, although two responses do show defensive failure. The general patterning focuses upon a good deal of passivity and the feeling that the female is alienated from him.

No stories could be elicited on the Thematic Apperception Test (TAT), his responses consisting of isolative descriptions and an absence of a sequential logical narration. His perceptual distortions within this sterile framework underscore a fundamental sexual disorganization (boy looking at a violin, "This is a girl sleeping"; two women and a man in a country scene, the barn seen as barracks and mention made of "two men and a girl", the second man derived from a very evident female figure; picture of a middle-aged couple in what is usually described as a consolatory embrace, "There are two female persons" (Q), "They are sleeping both").

The Mini-Mult was administered by the interpreter who was given a copy of the test while the examiner recorded his translation of the responses given by your client. Only 4 of the 71 items were refused, the answers on this test requiring a yes or no response. On several occasions he commented on his answers.

A generalization drawn from the profile pattern points to a good deal of somatization encompassing anxiety, dizziness, forgetfulness, and suicidal ruminations. Items (among others) answered in the affirmative are attacks of nausea and vomiting, frequent nightmares and night sweats, the belief that he is being plotted against, forgetfulness of what he had been engaged in doing, being the object of faultfinding by others, the belief that no one much cares what happen to him, and the complaint that he has no energy.

The diagnostic pattern reads out as "depressive reaction, possibly schizo-affective type".

The last test of the battery was the Incomplete Sentences Test to which he responded quickly. Hostile and resentful feelings towards others are shown by his statement that he admires nobody, that most men "Is happy that I'm sick", and that most women "don't like me". His wife always "Does'nt like me in bed", the combination of responses corroborating interpretations drawn from other portions of the test battery. Such responses, including his wish to die "because of the dizziness" and his formulation of his main problem, "If I could be healthy again, and I don't think I can" effectively rule out the remotest possibility of denial as emphasized in a report by another psychologist.

The test data suggest diffuse cerebral pathology affecting cognitive and perceptual processes in a man who shows schizo-affective characteristics accompanied by anxiety, depression, and some paranoid features. The tests used for assessment of organicity are more sensitive than a neurological examination, and the diffuse nature of

would not be incompatible with a negative EEG. It should be stressed that no neurological examination was made and that such an examinatio. would be outside the competence of the examiner. What was being evaluated were cognitive and perceptual motor processes that in this instance yield data associated with cerebral dysfunction. Gross and bizarre responses on other tests point to the psychotic component that could be overlooked in an interview session.

The prognosis is guarded at best. Psychotherapeutic intervention would be handicapped by the need for a third person, the interpreter, as well as by Mr. Picinich's distrust of others and his feelings of being persecuted. Recourse to extensive somatization is probably attributable to intense feelings of frustration and helplessness, accentuating and extending those physical disabilities that have been described in other reports.

Fred Brown

Fred Brown, Ph.D.

9/30/75

JJG

Mortimer F. Shapiro, M. D.
960 Park Avenue
New York, N. Y. 10028
REgent 7-2440

September 29, 1975

McHugh, Heckman, Smith & Leonard
Eighty Pine Street
New York, N.Y. 10005

Re: Anton Picinich

Gentlemen:

As requested I examined Anton Picinich at my office Sept. 26, 1975. Mr. Picinich was accompanied by Mr. Arthur Sheehan of the office of Kenneth Heller and by an interpreter, Olga Rakijas. It was my impression that Ms. Rakijas functioned efficiently as an interpreter.

Prior to examining Mr. Picinich, I reviewed the extensive medical file.

I reviewed a copy of the Emergency Room Record at St.Mary's Hospital dated July 12 1971. I note that the entry there states that Mr. Picinich was "alert ambulating - not in distress." The examiner noted the presence of ecchymosis of the right side of the forehead, facial abrasion, and contusion of the right forearm, and then adds - "no other evidence of injuries." X-rays of the chest and the right forearm were normal.

I reviewed a report from Gerald L. Winokur, Aug. 16, 1971. Dr. Winokur reported a normal neurologic examination and concluded that from the history, Mr. Picinich incurred a "contusion of the skull and multiple contusions of the body. However Dr. Winokur states that he found nothing organically neurologicaliy. He felt that his complaints "are purely subjective in nature."

In a report of Oct. 13, 1971, Dr. Arthur L. Matles reported decrease of the cervical and lumbar lordosis with tenderness overlying the cervical spine lower thorical lumbar spine with a decrease range of motion of the lower thorical lumbar spine of 12 to 15 degrees in all ranges. He also found tenderness in both shoulder areas and decrease in range of motion in the shoulders. He also reported decrease in range of motion of the cervical spine and concluded that the patient has a permanent disability due to the accident of July 12 1971.

Dr. M.C. Johnston in a report of Aug. 17, 1973 felt there was a permanency in the loss of function in the right shoulder which did not exceed 10% of the right arm. He felt that any loss of function in the left shoulder was 5% of the left arm, and he felt also that the right leg showed a loss of

Exhibit 3
- 1G

Mortimer F. Shapiro, M. D.
960 Park Avenue
New York, N. Y. 10028
REgent 7-2440

Re: Anton Picinich

function not in excess of 10% of the right leg.

Dr. Eugene Allen examined Mr. Picinich on Dec. 10, 1973, and concluded that Mr. Picinich suffered from "Chronic Depression with Anxiety." He suggested neurological evaluation - "if not done" and psychiatric observation and treatment if necessary. He felt that there was disability and that the disability was psychiatric and due to the accident of July 12, 1971.

Dr. Lawrence I. Kaplan reported March 30, 1975. "The neurological and electroencephalographic examinations are completely within normal limits and there is no evidence of any organic neurological problem. This patient has a number of subjective symptoms as noted above, and the findings on examination are psychogenic in nature. There is no evidence of any neurological disability. The patient is fully employed in his regular job and there is no evidence of any psychiatric occupational disability."

Dr. Harry Sherman reported on June 20, 1975 that he found restriction of full elevation of both shoulders and that this constituted a permanent partial disability causally related to the accident of July 12, 1971. He felt also that nervousness and dizzy spells which Mr. Picinich complained of represented a psychogenic overlay causally related to the same accident. He felt that all these conditions were permanent, and there was a permanent partial disability.

Dr. Elias Savitsky examined Mr. Picinich on June 25, 1975, and concluded, "Patient sustained multiple injuries at the time of accident. The post-traumatic course has been characterized by mobilization of anxiety, epigastric distress persists. There is claim the hearing defect on the right and occasional dizzy sensations. The examination of the ears was unsatisfactory and the patient should be referred to a specialist in this field for a more definitive evaluation and determination of causal relationship. At this point the impression is of an anxiety state, post-traumatic with depressive features and evidence of conversion syndrome. The epigastric distress appears to be part of the tension state. There is a slight hypochondriacal quality about his attribution of this to the events of the accident. Management would consist of reassurance regarding organic sequelae of injury, use of medications for management of the anxiety, depressive feelings. Further study of his attitudes, lifestyle might be helpful if conducted by a person who speaks his language. Prognosis is guarded as many factors entering into the perpetuation of anxieties such as this, once established. There is a continued partial disability, causally related to the injury of 7/12/71."

Mortimer F. Shapiro, M.D.
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REgent 7-2440

Re: Anton Picinich

Dr. Lawrence Edwin Abt reported on Sept. 11, 1975 that he felt, as a result of psychologic testing that the prognosis for Mr. Picinich was "guarded." He suggested counseling or psychotherapy, if a suitable psychotherapist could be found. Dr. Abt, who is not a physician, but apparently is a psychologist, was under the impression that Mr. Picinich was "highly anxious, tense, and considerably depressed"with many somatic symptoms, some of which he believed were expressions of a central anxiety problem.

I reviewed reports from NYSA-ILA Medical Center of Hoboken. There is a notation there that on Jan. 30, 1975 he complained of pain in the right elbow and a diagnosis of epicondylitis was made by x-rays and treated by an orthopedic consultant Mr. U. Bigliani. In this file, there is a report of x-ray which purport to show soft-tissue thickening at the right elbow, and the radiologist concluded that there was antecubital synovitis and some roughening of bone and ossification of ligament attachment to the lateral epicondyle of the humerus compatible with epicondylitis.

Also, I reviewed a report from Dr. Nicholas A. Merola, July 12, 1973. Dr. Merola concluded there was a loss of function of each arm, and 15% loss of function of the right lower extremity.

Additionally I reviewed Attending Physician's Reports by Drs. Alfred M. Zitani and Luigi Racanelli.

Finally, I reviewed the Deposition of Anton Picinich, Nov. 20, 1973.

Mr. Picinich was neatly dressed. At the beginning of the interview, he did not appear depressed. His intelligence appeared to be about average. As the interview progressed, however, it became evident that there was a mild depression present.

At my request, he described the events of July 12, 1971. He did this without any rise in the level of anxiety. He informed me that he fell 35 feet into the water. Originally he said that he was unconscious. However, when asked whether he recalled hitting the water he admitted that he did recall hitting the water. He described the sensation as "It was a burning sensation." He recalls bobbing up and down, and he recalls people throwing him a life preserver. Despite all this, and despite the fact that attempts were made to explain exactly what unconscious meant, he persisted in the statement, and indicated that he was unconscious several times while he was in the water and then intermittently while he was dragged out of the water. He persisted in saying that he was unconscious

Mortimer F. Shapiro, M. D.
960 Park Avenue
New York, N. Y. 10028
REgent 7-2440

for 15 minutes after being pulled out of the water. When this was again questioned, he changed his statement to indicate that he felt dizzy and that intermittently things were dark in front of his eyes. Apparently, at no time, however, did he faint or lose consciousness.

He also told me, through the interpreter, that he swallowed a great deal of water and that his stomach hurt. However, he did not vomit until he went home. This was some 5 to 6 hours after the accident.

Mr. Picinich also stated that the entire right side of his body was black and blue. He says that he saw this when he got home. (Incidentally it is to be noted that no such observation was made in the Emergency Room of St. Mary's Hospital).

In describing how he felt when he was pulled out of the water, he said, "I had pain all over my body, especially the right side. I had dizzy spells." He also added that he found blood in his stool. However, when questioned about this, he responded that this did not occur until some 15 days after the accident.

He told me that he saw Dr. Zitani on the first or second day after the accident. He has not been treated by a physician for at least 6 months. He is unable to recall the physician who last treated him.

He offered the following complaints:

He complained of constant pain, and pointed to his heart, the left and right shoulders. He was unable to define the quality or incidence of the pain, saying that it was there all of the time. There were, apparently, according to him, no intervals of time free of pain.

He complained, "I can't lift my arms because it hurts." Saying this, he pointed to the left shoulder and the entire right upper extremity.

He complained that his head was always dizzy, that he had spinning sensations, and that he got headaches 2 to 4 times a day. He said the longest interval free of headache was one day.

He complained that his sleep was poor, and that sometimes he got cramps behind his knees. He complained that he is unable to climb to heights because he is afraid that he may have a dizzy spell and fall.

Mortimer F. Shapiro, M.D.
960 Park Avenue
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REgent 7-2440

Additionally, he complained that he was very nervous at home and said, "I'm too nervous since the accident. I can't take the children. They get on my nerves. They are too noisy." In the same context of discussing his home life, he indicated that he has sex only every 5 to 6 months. He added, "I'm scared, everything scares me."

He was questioned about his past history and informed me that in 1949, he had pleurisy. In 1964 or 1965, he injured his left elbow and was out of work for about two weeks. He had a nasal injury in 1974, apparently of no consequence.

He told me that he was born in Yugoslavia. It may be worth noting that he was brought up on the seashore and swam a great deal, and swam well, as a child. His father was a farmer. Mr. Picinich was the second of five children. He had five grades of schooling, finishing at about 11 or 12. He then worked on the family farm, and also worked as a salesman for the wine grown on the family farm. In 1961, he left Yugoslavia, and lived in Italy for about a year. He was in the Italian Army between 1942 and 1943, and then was in the Yugoslav Army for about 3 months in 1945. With the end of the war, he returned to the family farm and continued as a farmer and wine salesman. He came to the U.S. in 1963 and worked in factories. He has been a longshoreman for the past 11 or 12 years.

He married in 1946. He had four children, one of whom died.

He was questioned about his daily activities and said that he does very little. He says that he tries to watch T.V. but then "I fall asleep." He tries to read newspapers and magazines. He denies taking any alcohol. He says that he often goes for walks in the park. He denies visiting friends or any friends visiting him. Additionally, he stated that some times he weeps and says, "It just comes over me some times." In this same context, he says that his appetite is poor and he felt he may have lost weight.

A detailed clinical neurologic examination was performed. The following seemed noteworthy:

1) Mr. Picinich was heavily muscled. There was no evidence of any atrophy around the shoulder girdles, or anywhere else.

2) It was noted that he was more than markedly obese. His weight was 207 lbs. Mr. Picinich said that his weight prior to the accident was 225 lbs.

Mortimer F. Shapiro, M. D.
960 Park Avenue
New York, N. Y. 10028
REgent 7-2440

3) Initially, on direct testing, Mr. Picinich professed a quite bizarre weakness of grasp. However, it was possible, through suggestion, to get him to demonstrate completely normal grasp.

4) There was absolutely no restriction of motion in terms of elevation of the arms. This was demonstrated only after an initial reluctance on Mr. Picinich's part. This reluctance was quite similar in type to the rather bizarre weakness of grasp he exhibited on initial testing of muscle power.

5) He professed hypalgesia and hypesthesia of the entire right side of the body. This hypalgesia and hypesthesia ended very sharply at the mid-line. It evidently was not organic in origin.

6) Mr. Picinich professed complete astereognosis in both hands. This was at marked variance with his ability to perform other tests with the hands.

7) His blood pressure was recorded at 140/80, his pulse was 76.

Psychiatric examination disclosed the presence of a mild to moderate degree of depression. It is to be noted that the depression did not inhibit his ability to communicate or to recount his history.

It is also to be noted that the depression has not inhibited Mr. Picinish from resuming work as a longshoreman. He has worked some ten months after the accident. However, he insists that he does not do any climbing while working as a longshoreman.

IMPRESSION: I find absolutely no evidence of neurologic disease.

From a psychiatric viewpoint, there does exist a mild Depression Syndrome. This Depression Syndrome does not significantly inhibit him from work, if one excepts his apparent inability to climb heights.

Mortimer F. Shapiro, M. D.
960 Park Avenue
New York, N. Y. 10028
REgent 7-2440

 Re: Anton Picinich

The Depression is I believe, a precipitate of the accident of July 12, 1971.

Yours sincerely,

Mortimer F. Shapiro, M.D.

MFS:sf

MR. T. GILLEN

Send to: ~~Joseph F. McGoldrick, Esq.~~
~~39 Broadway~~
New York 6, New York

This report must be completed factually on all lost time injuries by the Superintendent.

JOHN W. McGRATH CORPORATION
ATLANTIC & GULF STEVEDORES, INC.

SUPERINTENDENT'S REPORT OF ACCIDENT

Port HOBOKEN, N.J. Date of Accident 7/12/71

Pier Location PIER B, S/S Hour of Accident 9 AM

Name of Employee ANTONIO PICINICH Name of Ship CONCORDIA VIKING

Date & Time Ship Started 7/12/71 8AM Exact Location of Accident # 5 HATCH MAIN DECK PORT SIDE (OFF-SHORE)

Describe concisely what happened (include operation, equipment, etc.)

1) VESSEL HAD ARRIVED IN PORT WITH CONTAINERS STOWED ON DECK, TWO HIGH, TWO TIERS ABREAST
2) LASHINGS HAD BEEN REMOVED BY SHIP'S CREW. HOWEVER TWO WIRE LASHING WERE PARTIALLY STILL SECURED TO TO UPPERMOST OUTBOARD CONTAINER AT # 5 HATCH.
3) EMPLOYEE CLIMBED ON TOP TO REMOVE THESE WHILE DOING THIS CO-WORKERS HOOKED UP SLING TO HOIST ADJACENT INBOARD CONTAINER
4) UNDER SUPERVISION OF HATCH BOSS TIE WINCH DRIVER TOOK UP STRAIN ON INBOARD CONTAINER, CAUSING IT TO SWING AND BUMP INTO OUTBOARD CONTAINER.

Date of Report _____ ~~Superintendent~~ _____

Exhibit 8 IN CONFD

Send to: Joseph F. McGoldrick, Esq.
39 Broadway
New York 6, New York

This report must be completed factually on all lost time injuries by the Superintendent.

JOHN W. McGRATH CORPORATION
ATLANTIC & GULF STEVEDORES, INC.

SUPERINTENDENT'S REPORT OF ACCIDENT

Port _____ Date of Accident _____

Pier Location _____ Hour of Accident _____

Name of Employee _____ Name of Ship _____

Date & Time Ship Started _____ Exact Location of Accident _____

Describe concisely what happened (include operation, equipment, etc.)

5) THE BUMP CAUSED EMPLOYEE TO LOOSE HIS BALANCE AND FALL OVERBOARD.

6) EMPLOYEE WAS ABLE TO SWIM AROUND STERN OF VESSEL TO PIER AARON. WHERE HE WAS HAULED UP BY DOCKMEN WITH ASSISTANCE OF HEAVING LINE AND LIFE-RING.

CORRECTIVE ACTION:

ALL FOREMEN AND HATCH BOSSES HAVE BEEN INSTRUCTED THAT NO CARGO OPERATION SHALL START UNTIL ALL LASHINGS ON ALL DECK CARGO IN VICINITY HAVE BEEN REMOVED.

7) EMPLOYEE IS AN "EXTRA MAN" AND HAS NOT TO THIS DATE BEEN AVAILABLE FOR INTERVIEW

Date of Report _____ ~~Superintendent~~ C R Mallison
Safety Dir.

8/26/76 - Bill of Costs as taxed in the sum of $1147.40, in favor of defendants, as against plaintiff, and added to the judgment.

Raymond F. Burghardt
Clerk

Griesa, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTON PICINICH
Plaintiff : 71 Civil 5357 (TPG)

-against-

CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP COMPANY, INC. SKIBS A/S SAMUEL BAKKE
: JUDGMENT

Defendants and Third Party Plaintiffs
:

-against-

JOHN W. McGRATH CORPORATION
:

Third Party Defendant

U.S. DISTRICT COURT FILED NOV 13 1975 S.D. OF N.Y.

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Thomas P. Griesa, United States District Judge, and a jury, on October 6,7,8,9,14,15,16 and 17, 1975, on the main action, and the Court having submitted the attached special interrogatories to the jury, and the jury having answered the said interrogatories, and the jury thereafter having returned a verdict in favor of the defendants, and the Court having handed down a memorandum that there is nothing remaining to be tried by the Court, in regard the third party complaint in view of the letter dated November 5, 1975, the Court directs that a judgment be entered, it is,

ORDERED, ADJUDGED and DECREED: That defendants CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP COMPANY, INC., SKIBS A/S SAMUEL BAKKE, have judgment against the plaintiff ANTON PICINICH, dismissing the complaint, and it is further,

ORDERED: That the third party complaint be and it is hereby dismissed.

Dated: New York, N.Y.
November 13, 1975

Raymond F. Burghardt
Clerk

APPROVED:

Thomas P. Griesa

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTON PICINICH,

Plaintiff,

-against-

CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP COMPANY, INC.,

Defendants.

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71 Civ. 5357

SKIBS A/S SAMUEL BAKKE,

Defendant and Third-Party Plaintiff,

-against-

JOHN W. MC GRATH CORPORATION,

Third-Party Defendant

B E F O R E: HON. THOMAS P. GRIESA

District Judge
And a Jury

October 6, 1975
New York, N.Y.

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APPEARANCES:

KENNETH HELLER, ESQ.,
THEODORE FRIEDMAN, ESQ.,
Attorneys for the Plaintiff

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
Attorneys for the Defendants and
Third-Party Plaintiffs
BY: WILLIAM P. KAIN, ESQ.,
EDWARD J. MURPHY, ESQ.,
JOSEPH V. FLEMING, ESQ.

JAMES LEONARD, ESQ.,
Attorney for Third-Party Defendant

* * * *

(In open court - jury present)

MR. KAIN: Your Honor, may we have a brief side bar before we begin? Perhaps I can say, may I ask your Honor to exclude the fact witnesses?

THE COURT: Yes, all witnesses be excluded. Fact witnesses, except parties.

Ladies and gentlemen, if there is any potential witness in the courtroom, except a party, please leave.

MR. FRIEDMAN: They don't understand English. May I be excused to tell them?

THE COURT: Yes.

Ladies and gentlemen, the order of the case is as follows: and let me explain two preliminary things. I mentioned to you before this was, and it started out to be in effect, two lawsuits. We had the claim of Mr. Picinich

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against the ship owner and then the claim of the ship owner against the stevedoring company. Now we all apologize to you for the lenthy conference but I think one helpful result of that was this: that you need only concern yourselves with the claim of Mr. Picinich against the shipowner. You do not need to concern yourself with that indemnity claim of the shipowner against the stevedoring company.

Mr. Leonard, on behalf of the stevedoring company, may be cross examining witnesses, may be making some statements or may be putting on witnesses because he has a legitimat interest in the first claim. But really, basically, you don't have a lot to worry about. Your job is to listen to the evidence and keep focusing, regardless of who is doing the cross examining. The point is the merits of the claim of Mr. Picinich against the shipping company. I as the Court will decide all the issues about the indemnity claim.

The first stage of the case, the plaintiff lawyer will make an opening statement to you. Mr. Kain on behalf of the shipowner will make his opening statement to you. If Mr. Leonard has anything to add, he will add to it.

Then we come to the evidence and the plaintiff's case on the evidence will be put in, then the defense case will be put in. There may be a little rebuttal following that on the part of the plaintiff, if he chooses to do so.

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After that the lawyers will make their closing arguments to you. After that has occurred I will instruct you on the law. Then you go to your deliberations and reach your verdict.

Now, you, as the jury, and I as the judge, have two different functions. You are to decide the issues of fact. Then you will take the rules of law that I give you and you will apply those to the facts that you have found and you will reach your verdict.

Now, in determining issues of fact you are to base your determination solely on the evidence introduced in this courtroom. What does that evidence consist of? It consists of the testimony you will hear from the witness chair, it may consist of some documents introduced into evidence. Sometimes it consists of depositions or deposition testimony taken outside of court. I don't know if there will be any deposition testimony here or not.

As you know, I'm sure there frequently are questions about what evidence should be admitted. One of the lawyers may ask the question and another lawyer objects. Sometimes after a piece of testimony has been given a lawyer moves to strike it out because it is improper under our rules of evidence for some reason.

Now, it is my job as the judge to rule on those

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problems of law and procedure. It is my job to rule on the basis of the rules of evidence, it is my job to rule on objections, motions to strike, and so forth. That isn't of any particular concern of yours as to why I am ruling one way or the other. Your job is to make sure you follow the ruling. If I strike out any piece of evidence you should really do your best mentally to exclude it from your considerations when you come to your deliberations later on and you are totaling up the evidence for one party and so forth, you can't consider that piece of evidence that has been stricken.

To the extent possible we will avoid conferences at what we call the side bar, but when we do have such a conference it is not with the intention of being rude to you. It just means that we can talk over items which in my judgment might confuse you a little bit if you have to hear all about that. So that is the reason we may talk privately at times. We try to avoid it as much as we can.

One of the principal jobs of the jury in the usual case is to determine questions of credibility. I don't know what questions of credibility there are or there are not in this case. I haven't, of course, heard the testimony. But generally there are such questions. And how do you determine issues of credibility? Well, you do it in the

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courtroom just about the way you do it in ordinary life. Although we don't realize it, we are continually assessing people's credibility. People tell us things, people we deal with in business, our friends, our families, and we, to some extent, are continually thinking and a lot of times we think how accurate is their memory, how trustworthy? Are they telling us the truth or are they trying to fabricate or tell us something else? How do you do that? First of all you look at the people. Did they appear to be candid or did they appear to be shifty, or something other than candid? So that is very important. But it isn't the end of the story because as we all know there are plenty of good actors in this world and there are people who can be very truthful looking and not be telling the truth. There are people who are lying and who are experienced at lying so they can lie very well. So you have to go beyond the appearance. And you will assess their story, see how it stacks up with other facts and other evidence in the case. See if there are contradictions, where one part of a witness' story contradicts another part of the story. See perhaps if what he is saying in court is inconsistent with what he heard outside or what he said outside the courtroom on another occasion. How probable or improbable is his story? That kind of thing. All the way through you have to use balance

and common sense. Sometimes there is an inconsistency in a witness' story and a lawyer will give it a tremendous -- try to give it a tremendous effect in his summation and really it shouldn't have much of an effect. It is not very significant. So continually think, as you are watching these witnesses and listening to the witnesses, how does he appear and how good does his story stack up against other things that he says and other things in the evidence. If you find inconsistencies, again look at it with some balance and a sensible point of view. Is it important or is it trivial?

One thing that is terribly important is this: your verdict in this case is to be based exclusively on a rational objective look at the evidence and an application of the law. What does that mean? It means it is not to be determined by prejudice, by emotion, by sympathy, by hostility, by the fact you may like the way one lawyer handles it and don't like the way another lawyer handles it. All of those are factors that have no place in your deliberations. Whether you like the plaintiff or don't like him, whether you like somebody or not, that isn't important. Whether one is a corporation and one is an individual is not important. Everybody is supposed to be equal in this court, whether it is the biggest corporation in the world or the littlest

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plaintiff. They are equal in this court and nobody is entitled to a verdict based on sympathy or emotion or hostility or dislike, anything like that.

If your verdict were to be based on that, we shouldn't bother having a jury trial and put on evidence. It is a waste of time.

Finally, I repeat the instruction about not discussing the case in any way or the personalities involved in the case or the subject matter of a case with anybody at all until you come to your final deliberations.

All right, Mr. Heller, you may open.

MR. HELLER: Your Honor, ladies and gentlemen of the jury, my opponents, you heard my name is Kenneth Heller and I represent the plaintiff.

Does everybody hear me clearly? Mr. Formal and ladies and gentlemen, do you hear me clearly?

Plaintiff Anton Picinich is a longshoreman and has been ever since he came to the United States. He lives in Hoboken, New Jersey, and he works in Hoboken, New Jersey. Back on July 12, 1971, he suffered an injury on a Norwegian flag ship or a Norwegian owned ship owned by this fellow, Samuel Bakke. While the ship was discharging cargo at pier B in Hoboken, New Jersey.

Now, Mr. Picinich sues, and the law gives him the

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right to sue, both for negligence, which everybody knows about, and breach of a shipowner's warranty of seaworthiness. He has two theories of law and the Court will explain it to you later on. Everybody knows what a warranty is.

Now, plaintiff does not speak English. He was born in Yugoslavia. He came here in 1963. Since that time, since the accident, he has worked in Hoboken, New Jersey, as a longshoreman. He has worked with other Yugoslav longshoremen doing the hardest work that any longshoreman, does, in the hold of a ship. That is where his job is. Lifting, pushing pulling and dragging cargo, notwithstanding all the advertisements about everything going into a box, the cargo still must be lifted, pushed, and pulled by manpower.

Now, this plaintiff not only works in Hoboken, lives in Hoboken, but he lives and works in a community of Yugoslavs who came from his hometown and his home island, an island, in Italian, you might call it Sansego, in Croatian called Susak, and they all live and work in Hoboken and they all came from the same place. His home life both working and socially is involved with his countrymen and his own language. I hope you won't have any antipathy towards that. He works hard and we need him because about 2,000 of these people supply the brutal hard labor down in the hold

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of a ship that helps ships get their cargo out in the port of New York. You must take into consideration that his entire life revolved, until the accident, revolved around the community and the people he worked with and lived with and his social life was also based amongst his family, his children, his friends and his club. He belonged to a club, and you will hear us mention it. Unfortunately, he didn't belong to the Yale, the Harvard --

THE COURT: Let's get to the accident, Mr. Heller. We don't have to get to the Harvard Club, the Yale Club.

MR. HELLER: This is part of the plaintiff's life.

And his social life, family life --

THE COURT: Can we get to the accident? Maybe that would help us all. I'm eager to hear it.

MR. HELLER: If you please, your Honor, this is part of his damages.

THE COURT: Let's get to the accident.

MR. HELLER: It is our claim that the accident destroyed his life, other than during the eight hours a day that he works in the hold.

In order to explain it, and I know nobody has been a longshoreman, the Court questioned you about that ex-

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tensively. You are not familiar with longshoring work and we know that. I will try a little to explain this to you. It is my job. I represent the plaintiff.

Longshoremen work in gangs of 17 to 20 men, depending on attrition, whether there is removal of one or more men. And there are various categories of longshoremen in the same gang. The plaintiff, as I said, works in the hold. There are eight holdmen and two or three winch operators and four dockmen and two drivers. But the plaintiff has the lowest category and the hardest working category.

Now, as a holdman he reported to work back on July 12, '71, with his regular gang. You see, longshoremen usually belong to a regular gang, if there is work. What happened here, there was no work for his gang and so they broke up his gang from pier C -- there are three piers, A, B and C in Hoboken, and they sent him to fill in another gang, and that was Mr. Santoro's gang. He went from pier C to pier B where the Norwegian ship called the Concordia Viking was moored on the left side of the pier facing inland, and he reported to Mr. Santoro's gang. Mr. Santoro instructed him and the other Yugoslav longshoremen that reported with him for them to discharge cargo containers or boxes -- that is what they call them -- that were sitting on top of the deck. The ship had just arrived at the dock.

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Nothing had been unloaded from the ship. It hadn't been working cargo. So they were supposed to discharge eight cargo containers.

There were four men assigned to this task. I must try to tell you how the cargo containers were arranged because the arrangement and the equipment is what caused and contributed to the happening of this accident. And I hope I can explain it to you.

The cargo containers are steel boxes about eight foot wide, eight foot high and 20 feet long. And on the left side of the ship in the 20 foot of deck space between the hatch coaming and the bulwark, in that 20 feet they had stacked eight empty cargo containers and they had been loaded in a foreign port. This vessel never goes to Norway. A Norwegian flag but it goes from the United States to the Far East and back. In the Far East and the Persian Gulf they had picked up these eight empty steel boxes and they were stacked on deck and tied down with lashing, just like you tie the top of a box, and they were stacked in this fashion: in four groups of two each.

Now, to describe it with my hands, two, two, two and two. Four groups of two each, and each container in groups of two were stacked one on top of the other. So, in other words, since the containers were eight foot wide,

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that means it covered a cube of two containers wide, eight and eight, being sixteen foot. 20 foot each containers, that's 40 feet. That means a square foot inch of 16 by 40 feet. They were stacked two high. That means they were placed sixteen feet high.

Does everybody understand the cube? Sixteen feet wide by 40 feet long by sixteen feet high. That was a cube of all the containers, eight.

However, we will just address ourselves to the aft four containers, the four containers that were on the after end. That is two and two. Two containers were closest to the hatch. We will call them inshore containers; two were farther from the hatch, they were offshore. They all abutted, all packed together in a square.

Now, what happened was when the ship came in and these men were sent there, it was eight o'clock in the morning, twenty after eight, ten after eight, and the plaintiff and another man climbed onto the two containers which were closest to the hatch, they climbed sixteen feet high and above them dangling from the ship's booms and running to the ship's winches was a wire with four hooks. Plaintiff and another man placed the hooks through openings in the top of the container so that the ship's winches could then revolve, turn and lift the container off and bring it

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ashore.

Now, as soon as this was hooked up, the plaintiff and another man stepped to the offshore or the ones that are left of it, if we face the bow room, and step to the next one, and sixteen feet in the air they still are, stepped to the next containers.

Does everybody understand me?

Now, when they stepped to the next two containers there were still what we call lashings. That is a nautical term which means those wire ropes or cables with turn buckles and attachments, that were still laying there left by the ship's crew busy eating breakfast. Lashings running to the forward one, so the man with Mr. Picinich, he stepped to the forward container right in front and left Mr. Picinich there and they were both loosening the lashings --

THE COURT: I take it you will have proof of this. You don't have to put your whole case in the opening. Why don't you summarize and take about another five minutes and summarize and the jury will hear the evidence.

MR. HELLER: Your Honor, Mr. Picinich does not speak English.

THE COURT: He is going to have an interpreter?

MR. HELLER: Yes. In an opening I am entitled, I hope, your Honor, to explain this.

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THE COURT: You can summarize it. Please, all right.

MR. HELLER: What happened was that the container that was hacked up starting to come up into the air and when it came up to a point where it just cleared the one on which Mr. Picinich was standing, that container slid over into the empty space and by moving under his feet it hurtled him over the side of the ship. Thank God he cleared the bulwark, the side of the steel, or he would be dead. He cleared the side, flew over and fell some four stories, 40 feet to the water below striking his right side.

The Court told you you will have to decide questions of fact. We will prove what the defendant shipowner did wrong that caused this container to move under his feet. Now, if we prove one of the things I am going to tell you about or more, and I don't have to prove all of them, just one or more, we will be entitled to a verdict.

If you find from the evidence that the defendant ship's officers failed to supervise the loading and securing of these containers properly in a foreign port or tying these down, then we would be entitled to recover. If we prove that defendant ship's officers were not on duty on the deck of this ship at the time these big containers were being unloaded and that their failure to supervise the discharging

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or unloading --

MR. KAIN: If your Honor please, I hesitate to interrupt counsel, but he is arguing law to this jury rather than telling them what he is going to prove.

THE COURT: What he is saying is these are the things he claims. It is just another way -- I guess you could make it more clear, but you go ahead.

MR. HELLER: Your Honor, I think I'm making it clear. I hope the jury thinks so.

Now, if we prove that these containers when they were loaded in a foreign port did not have on them a safety lock or a safety device called a sure lock, to lock containers together and lock them to the deck, if we prove these things, and they call them shoes, locks or latches so they couldn't be locked together. If we prove that the ship's officers failed to make certain in the foreign port, they failed to take this into account, failed to supervise in New York knowing these shoes were not there, we would be entitled to recover.

If we prove that the ship's officers in New York before the containers were discharged failed to hold on or secure them in some way so they wouldn't move like that sixteen feet in the air under the plaintiff's feet, we would be entitled to recover.

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Or if we prove that the ship's officers failed to instruct the longshoremen that these containers were movable, as they were, we would be entitled to recover. Or if they failed to reach some safety device, the ship's officers knowing the containers had no shoes, no locks, knowin; they were empty containers, we would be entitled to recover.

We would be entitled to recover if the stevedoring company used any improper method of unloading the containers.

Any one of these things, and they don't have to be together, any one of these which caused these containers, without warning to move under this man's feet and hurtle him 35 feet over the side of the ship, we would be entitled to recover.

Thereafter when Mr. Picinich's body struck the water, and you will know that falling four stories to the water is not like jumping into a kidney pool. When your body, the body of a 200 pound man is hurtled this distance and strikes his side, he sustained quite a bit of trauma.

Finally, he came up. He went down under water, came up; went down, came up, before somebody threw him a line, they dragged him around where the dock was, men went down on a string piece, lifted him up to the dock and laid him on what they call a pallet. It is some pieces of wood.

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They laid him flat down. At that point he was in a state of shock. Then a fork lift machine came in and took him to the end of the dock, to the office where they took off his clothes and put coveralls on him. They didn't administer any first aid. Rather than wait for an ambulance, they put him in a car, took him to St. Mary's Hospital in Hoboken. At St. Mary's they X-rayed him. They didn't treat his stomach. He had swallowed some of that delicious Hudson River water. Finally after X-raying him they sent him home. He was taken home by another longshoreman, went to bed.

He was home approximately three months under the treatment of his employer's doctor, a doctor named Zitani, Z-i-t-a-n-i. He was also treated by another doctor designated by the defendants, Dr. Winokur, a neurologist, an orthopedist and neurologist. After three months they decided to send him back to work.

During this three month period the signs of his emotional disturbance started. He started to withdraw, instead of being gregarious, visiting at family affairs, picnics, he started to stay home, not going anywhere. Instead of going to all the family social functions, he stopped that. After three months the doctors couldn't find or defendants' doctors that is, couldn't find anything physically wrong with him, they claim, and they sent him back

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to the ship to work down in the lower hold. He went to work about a day and, of course, without the smoke, the lower hold of the ship, the noise is like Dante's Inferno. It is quite active and noisy. After one day he walked out. Here is a man who worked steadily for eight years before the accident, never missing any time. He walked out. He couldn't take it.

He went home, walked into his house, stayed home for seven months, except for two or three times when he went to see a doctor about his pains in his back, after being hurled this distance. He withdrew completely.

In fact, we will prove that he didn't even attend his granddaughter's christening, which is very unusual for a gregarious person like he was.

Now, after ten months he went back to work. They don't work steadily and they have their guaranteed wage, so he worked two days one week and the next week he didn't work and two days the following week, three days. He went back to work in the hold of a ship and he has been working in the hold of a ship since. That is only eight hours of the day or thereabouts.

We will bring the expert doctors, psychologists who will testify he has now gone into the depths of depression, withdrawn completely. We will bring in and prove the emotiona

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disturbance that destroyed his life. He is not a tennis player and golf player, and how did he live? We all can't live by working on a job. We must have something else in life, all of us. He has withdrawn from the socializing, and we will prove this through the testimony of expert doctors. We will even prove it through the testimony of the defendants' doctor, Dr. Mortimer Shapiro, the depths of his emotional disturbance.

This disturbance is not like a broken leg or arm, which is something you can see or feel or hear, and he is not a well educated man. He doesn't know what is wrong with him He knows what affects him but he doesn't know what is wrong with him. But it has reached a stage where it is chronic and at this point we doubt whether it can be cured. But we will let the doctors tell you.

I thank you for your attention and I hope you have understood my explanation of what happened here. Thank you very much.

THE COURT: Mr. Kain, please.

MR. KAIN: May it please the Court, Mr. Forman, ladies and gentlemen of the jury: as you have heard, my name is Kain and I am the attorney for the defendant shipowner in this case. Initially let me start out by saying to you that there is no dispute in this case but that this plaintiff fell

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from the top of a container into the Hudson River on July 12, 1971. But as his Honor will tell you, he has the burden of explaining why he fell, why the accident occurred. To my knowledge, and I tell you this now, to my knowledge --

MR. FRIEDMAN: I will object to him stating there is a burden of proof as to the reason the container shifted. I will leave that to your Honor's charge to determine.

THE COURT: I don't know what I will instruct at this point, but can we avoid that, Mr. Kain?

MR. KAIN: All right, sir.

To my knowledge there were no ship's witnesses to this accident and I don't propose to go into detail with some explanation as to why it occurred. I would prefer that as the case progresses you will hear the explanation of this accident from the witnesses who appear here and testify.

However, I would ask you to bear in mind one statement made to you by Mr. Heller, and I am referring to his description of the accident as occurring when one of these containers, these 20 by 8 foot containers, suddenly moved violently to one side projecting this man over the side.

We propose to show you however this accident occurred, it did not occur in the manner which I have just ou

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lined as described by Mr. Heller.

You heard a lot about the supervision of ship's officers and their obligations to the longshoremen. We propose to show you that the supervision of longshoremen is the job of the contract stevedore and not the ship's officers. The stevedore is the expert, he holds himself out as an expert, he gets paid as an expert. So we propose to show you that this is not the obligation of the ship's officers.

And finally we ask you, and his Honor made some allusion to this, to reserve your opinions until you have heard all of the witnesses who testify for all of the parties. It is pretty easy for me to ask you to do this; it is not so easy for you to do. I think most people as they start to hear explanations you form an opinion based on what the witnesses have said to date. But I ask you in fairness to all the parties to reserve any fixed judgments as to liability in this case until you have heard all of the witnesses who are going to testify. That includes fact witnesses, expert witnesses. Wait until you hear them all.

You are going to hear in the course of this trial the claim for negligence and a claim for unseaworthiness. Unseaworthiness is a term of art which his Honor will explain to you. I don't propose to get into it except to tell you that by definition seaworthiness means reasonable fit

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ness for its intended use --

MR. HELLER: I object to the legal terminology before the jury.

THE COURT: I think this is all so irrelevant. We don't have to have very much of it.

MR. KAIN: I ask that you listen to the witnesses, all of them, and that you apply, as his Honor suggested to you before, your common sense, what you have learned in your everyday occupations, what you have learned in your contacts with other people, and if you do I at least am convinced that both I and my client will be pleased to abide by your decision which I am sure will convince you there is no part of negligence on the part of the shipowner and no unseaworthiness of its vessel or appliances.

MR. LEONARD: If it please the Court, ladies and gentlemen of the jury: as Judge Griesa has told you, I represent John W. McGrath Corporation, the company which is engaged in the stevedoring business. Our business is to load ships and unload ships. That is the only business we have and we specialize in that.

Mr. Heller, during the course of his opening, made a reference, and I'm sure it was a slip of the tongue on his part but I don't want to bear the burden of Mr. Heller's slip of the tongue. He said that the plaintiff went

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to a doctor designated by one of the defendants. There is only one defendant here, and that is the shipowner. The stevedoring company is not a defendant. The fact that it employed the plaintiff and designated the doctor, that is something else. But the defendant is the shipowner.

I say that, obvious though it may be, throughout this trial you are going to have to very carefully discriminate between what the plaintiff is claiming against the shipowner, the defendant, and any other view, fact or occurrence that you hear about. It is necessary and it is sometimes difficult in the shifting discussion that goes on to keep your eye on that particular ball. But if you do, then I submit I on behalf of my client will be satisfied.

One other point, and I will be very, very brief. You heard a detailed presentation of the facts that Mr. Heller expects to prove, and it is his right to give you a presentation of what he expects to prove. The only thing is Mr. Heller wasn't there, Mr. Kain wasn't there, I wasn't there. Anything that comes out of a lawyer's mouth is not testimony. It is only from the witness' mouth.

So instead of starting, if you have this temptation, with a preconception of how this accident happened, as if you have already been given the word on what took place, I ask you to start with a clear mind and a clean slate and

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only pay attention not to the suggestions or hints or innuendos of lawyers, but to what the witnesses actually say, the people who were there, the people who are experts and who know. If you do that, then you have done right by your duty as jurors. If you permit yourself to be lured aside by something which is not evidence, then you will not have done any of the parties justice.

I ask, as did both the other lawyers, that you pay close attention to the witness and reserve. This is one forum in which a snap judgment has no place. If you defer your judgment until the end when you are in the jury box, ponder there what the judge has told you what the law is. Again, by the way, if I or the other attorneys suggest a knowledge of what the law is, pay no attention to that. That is only argument. The law in this case comes only from Judge Griesa, only. And if you decide that some word of a lawyer is suggesting to you what the law is, and maybe it is, the only authority is Judge Griesa. If he is wrong, we have our rights. We can appeal. There is no way any lawyer in this case can appeal from a mistaken inference that somebody has drawn from something that a lawyer said. So, again, remember the cast of characters. The witnesses give the facts, the lawyers make any arguments and Judge Griesa gives us the law.

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I will speak to you at the end of this case and I will give you my views then as to what the evidence shows or does not. This is my right. This does not mean I am a defendant in the case, for remember there is only one defendant.

I thank you in advance for your consideration, for your forbearance and even judgment in this case and I will speak to you again. Thank you very much.

THE COURT: The plaintiff's case.

MR. HELLER: Your Honor, may we, rather than put the plaintiff on and have his testimony truncated by a one o'clock lunch hour, may we come fifteen minutes early?

THE COURT: That is fine. Usually we will break from one o'clock and come back at 2:15. We will break now, come back at two and we will sit until about 4:30 and resume tomorrow at ten o'clock. The normal schedule will be ten to 4:30 with an hour and a quarter out for lunch.

See you at two o'clock.

(Luncheon Recess)

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AFTERNOON SESSION

2:00 p.m.

THE COURT: Proceed,Mr. Heller.

MR. HELLER: Thank you, your Honor. I would like to call Anton Picinich, plus,your Honor, we have the interpreter. May the Court explain to the jury that because of the plaintiff's lack of ability to use the English language, he will testify in the Croatian Primorsky tongue, your Honor, which I think they call it.

THE COURT: Let's have them come up

I want to question the interpreter.

(Interpreter Olga Rakijas - not sworn

BY THE COURT:

Q How do you pronounce your name?

A Rakijas.

Q R-a-k-i-j-a-s?

A The "J" you pronounce as a "Y."

Q Now, have you conversed with Mr. Picinich?

A Yes, I did.

Q And what language have you conversed with him in?

A That is Croation with a dialect Primorsky. What the people talk on the shore of the Adriatic.

Q Do you understand him and does he understand you?

A Apparently, yes.

Q As far as you have been able to tell; right?

A Yes.

Q Now, would you address some questions to Mr. Picinich for me now?

A Yes, gladly.

THE COURT: Mr. Picinich, have you talked to your interpreter this morning?

(Mr. Picinich answering through the interpreter)

THE PLAINTIFF: Yes.

THE COURT: And do you understand her, what she says to you?

THE PLAINTIFF: Yes.

THE COURT: You speak her language and she speaks your language; right?

THE PLAINTIFF: Yes.

THE COURT: Will you please sit down.

We will have the interpreter sworn.

(Olga Rijeka sworn as interpreter)

A N T O N P I C I N I C H, the Plaintiff, called as a witness in his own behalf, having been first duly sworn, testified through the interpreter as follows:

MR. LEONARD: Your Honor, may the interpreter be instructed to translate literally and fully everything the witness says?

THE COURT: I think that goes without saying.

DIRECT EXAMINATION

BY MR. HELLER:

Q Where and when were you born, Mr. Picinich?

A In Susak, 16 August 1922.

Q Where did you say?

A Susak.

Q And where is that, in Yugoslavia?

A Yes.

Q Is that an island off of Yugoslavia?

A Yes.

Q And where is it located?

A It is close to Rijeka, in Adriatic.

Q Is that the Adriatic Sea?

A Yes.

Q Are you married?

A Yes.

Q Do you have any children?

A Yes.

Q How many children?

A Three.

Q How many children live home?

A Two.

Q Now, when and in what year did you arrive in the

United States?

A In '63.

Q By the way, how much schooling do you have in Yugoslavia, how much formal schooling?

A Five years.

Q Now, before you arrived in the United States and while you were in Yugoslavia, what kind of work did you do in Yugoslavia?

A I was fisherman, wine salesman, and farmer.

Q Now, how did you get from Yugoslavia to the United States?

A I came with the family. I first went to Trieste; I stay for two months in Trieste, and then I went to a camp in Italy.

Q In where?

A Italy.

Q Is that a refugee camp?

A Yes, a refugee camp.

Q And then how long did you remain there before you got to the United States with your family?

A Ten months in the camp and two months in Trieste.

Q Now, when you arrived in the United States with your family in '63, what kind of work did you do?

A I was in a Tootsie Roll factory.

Q Is that the factory in Hoboken?

A Yes.

Q When you arrived in the United States, did you live in Hoboken?

A Yes.

Q You still live there?

A Yes.

Q Now, when you came to the United States, did you go to school to learn English?

A No.

Q Now, after working in this factory when did you become a longshoreman?

A I was working in the factory in the same time I applied to become a longshoreman and I worked as a longshoreman the same time.

Q Now, what job did you take as a longshoreman in the longshore gang?

A Holdman.

Q Now, can you explain to the judge and jury what kind of work a holdman does in a longshore gangon ship?

A The work is very hard. We were lifting big cases or big bags, sacks three to four hundred pounds heavy. But the work is very hard.

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Q Now, back in July, '71, July 12, '71, who was your employer?

A McGrath Stevedoring Company.

Q McGrath Stevedoring Company?

A Yes.

Q Did you belong to a regular longshore gang?

A Yes.

Q And what pier was that gang assigned to work in Hoboken?

A Pier C; but Pier C was closed at that time.

Q On July 12th when you went to work at pier C, what did they do with you? Where did they send you to work?

A I went to pier B on July 12th.

Q Were you assigned to any special gang in pier B?

A Yes. I went to pier C and they assigned me to work on pier B.

Q When you went to pier B, what was the name of the gang boss that you were assigned to work for?

A Santoro.

Q Would you pronounce it again?

A Yes, Santoro.

Q Is that S-a-n-t-o-r-o?

A Yes.

Q When you arrived at pier B in Mr. Santoro's gang,

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was there a ship there?

A Yes.

Q And do you recall the name of the ship?

A Yes.

Q What was the name of the ship?

A Concordia Viking.

Q Now, which side of the pier, the north or the south side, was the ship moored at?

A On the south.

Q Which side of the ship was moored to the pier?

A The right side of the ship.

Q Now, which hatch -- there is more than one hatch, by the way, on this ship, isn't there?

A Yes.

Q Which hatch was Mr. Santoro's gang assigned to?

A Number 5.

Q Now, is that hatch located more towards the bow of the ship or more towards the stern of the ship?

A Aft on the ship.

Q Now, when you arrived there, what was the condition of the ship? Had any work started?

A The ship just arrived.

Q Now, what time in the morning was this, approximate

A When I come to the ship. Ten after eight in the

morning.

Q Now, when you arrived at Mr. Santoro's -- by the way, were there other Yugoslav shoremen that also filled in?

A Yes.

Q And when you arrived at Mr. Santoro's, what job did he assign you to?

A They assigned four of us to discharge the containers on one side.

Q And which side of the ship was that?

A That was on the left side.

Q Now, when you say the left side, was that between the hatch coaming and the side of your ship?

A Yes, from the hatch to the bulwark.

Q How many feet wide is that, by the way?

A Where the containers were?

Q Yes. How many feet of deck space was that?

A From the containers to the bulwark or altogether?

Q From the hatch coaming to the bulwark.

A Around 20 feet.

Q Now, how many containers were stacked in that space?

A There were eight.

Q How were they placed? In how many groups?

A They were two and two and two and two.

Q Is that four groups of two each.

A Yes.

Q How were they placed with regard to each other? Were they scattered or placed together?

A They were close to each other, stuck close to each other.

Q And the individual group, how were the containers stacked? Was there two or more? Tell us.

A Two in each group stacked.

Q Now, how wide was this group of containers? How much space did it occupy in width?

A It was 40 feet long, sixteen wide and sixteen high.

Q Now, can you tell us, if you noticed anything unusual about these containers when you arrived there?

A I immediately noticed there were no shoes on those containers.

Q Now, when you say there were no shoes, is that a locking device or piece of equipment at the corner of each container?

A Yes. I mean the containers are attached to each other with those shoes.

Q And was there any shoes from the higher container

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to the lower container attaching them?

A There were not.

Q Were there any shoes attaching the containers to the deck or locking the containers to the deck of the ship?

A No.

Q Were there any lashings still hanging on there which indicated how the containers had been secured?

A There were no lashings. There were only lashings on the top of those containers but they were limp and loose.

Q Now, was there any provision on these containers for the insertion of shoes or locking devices in the corners?

A Yes, they were, holes for the shoes only.

THE COURT: Did you say ropes?

THE WITNESS: Holes.

Q Now, which container did you go to work on first?

A I put the ladder and I climbed up the container, the inshore aft container.

Q That is the container line aft and closest to the hatch coaming?

A Yes.

Q Now, how high did you have to climb to get on top of the container?

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A Sixteen.

Q When you got on top of the container, what were your duties with regard to hooking it up to the ship's winches and boom?

A Our duty or our work was to hook those hooks that were coming from the boom, to hook up that container to be able to be lifted toward whatever it was.

Q How many hooks were there?

A Four.

THE COURT: I don't get the physical picture. I thought that the witness said he climbed up the inshore aft one; am I correct?

MR. HELLER: Perfectly correct.

THE COURT: I don't picture what that would be, inshore aft.

You ask the witness. I am just trying to get the physical layout.

Let me explain. Maybe I am the only one in the room that has the problem.

MR. HELLER: I have problems, too.

THE COURT: I don't physically see whether these containers were stacked lengthwise, if you look along the length of the ship, or whether they are stacked kind of running crosswise. So if you could bring out from the witness again

exactly the arrangement and maybe he can draw a little sketch and then point out exactly where he climbed on his first climb; okay?

MR. HELLER: Yes, your Honor.

Q Mr. Picinich, you said there were eight containers in four groups.

A Yes, but they were together.

Q In other words, were they all placed in one oblong? I'll use that term, oblong.

A Yes.

Q And these four groups of two containers each, how was each group of two placed?

A There were two containers in each group, but in those two containers they were stacked one on the top of each other.

Q I ask you to indicate with your hands how the containers, and note for the record that the witness is indicating, how the containers were arranged?

A They're two this way (indicating).

THE COURT: We are not going to understand. Let me ask the witness through the interpreter.

The containers were so many feet long, so many feet wide; is that right, Mr. Picinich?

THE INTERPRETER: He said now they are together

they are 40 feet long, not 20.

THE COURT: If I were standing back of that group of containers looking forward, would those containers be lined up, would their length be the same as the ship?

THE WITNESS: Yes, they were placed alongside of the ship, lengthwise.

THE COURT: Now, right at the back of this group there would be how many containers on the deck? Would there be two containers on the deck right at the back?

THE WITNESS: Two groups.

THE COURT: And then there would be two containers on top of those two; right?

THE WITNESS: Yes, on the top of each was another one.

THE COURT: Now, which one did you climb on? I suppose that if you were on top of this group one of the ones on top would be near the bulkhead and one would be near the hatch coaming; is that right?

THE WITNESS: I climbed the container close to the hatch.

THE COURT: Thank you.

You may go ahead, Mr. Heller.

BY MR. HELLER:

Q Now, when you climbed the container close to the

hatch you said you were sixteen feet in the air; is that correct?

A Yes.

Q Now, what did you do when you were on top of that container?

A We were waiting for four hooks.

Q Now, when these hooks came down, they were attached to the ship's cargo gear?

A Yes, they were attached to the boom.

Q And when they came down, what did you and the other longshoremen do?

A I took two hooks and the other two hooks my partner took.

Q And what did you do with the two hooks?

A We attached to the container. There were some holes and we attached those hooks or put through those holes.

Q Now, after the two of you attached the holes, where did the both of you go? Did you stay there, did you leave or where did you go?

A Then I went to another container and my partner went in front of me to another one.

Q Now, how did you get to the other container from where you were?

A Those containers were very close to each other.

Q You just stepped over?

A Yes, I just stepped over.

Q When you stepped to the other container, which one was that, was that to the left or to the right? Did you step to the offshore side or the inshore side?

A I went to that one was closest to the water.

THE COURT: To the what?

THE WITNESS: Water.

Q That would be the offshore side?

A Yes, offshore.

THE COURT: In other words, was this in that same back group, you walked from the one by the coaming over to the one by the bulkhead; is that right?

THE WITNESS: Yes.

Q And where did your co-worker go?

A He went to the next one, again offshore.

Q Was that in front of you or behind you?

A In front of me.

Q And then what did the two of you do? Did you have to do something before you hooked up that?

A The boss told us to throw that lashing, ship lashing, what was on the top, to throw it out, to throw it away.

Q You mean to throw it in the garbage can or where

do you mean to throw the ship lashings? What were you supposed to do?

A No, we were throwing them on the deck.

Q Is that the snip's lashings, that wire, rope and equipment?

A Yes, they were ship lashings.

Q Were there any turn buckles? Do you know what turn buckles are?

A That was thrown before. There was only lashing on the top.

THE COURT: I missed something. Is he talking now about some lashings that were lying on this second container?

MR. HELLER: Yes, your Honor.

THE COURT: Just cover that again if you don't mind.

Q When you stepped to the offshore container and your partner went to the one in front of you, what lashings were lying there?

A That was a ship lashing.

THE COURT: Were they lying loose?

THE WITNESS: Loose

THE COURT: All right. Go ahead, Mr. Heller. I'm sorry.

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Q Now, you and your partner were engaged in throwing these off and what was happening to the container to your right which you had just finished hooking up? What was happening to that?

A They lift that container slowly up. When it reached the height of my container, when they clear the space underneath, the container I was standing on slid in the empty space and I found myself in the water.

Q I'm sorry?

A I found myself in the water.

Q Now, how high were you standing above the deck when your container started to slide?

A 35 to 40 feet from the water.

Q I'm sorry, I don't think you understood. How high was the container on which you were standing above the ship's deck?

A Sixteen feet.

Q And how far were you from the ship's bulwark, that is the steel side of the ship, how far were you when you were standing on that container which was sliding from under your feet?

A But the bulwark is down. It was not as high as I was.

Q How high was the bulwark?

A I'm not sure but five to six feet.

Q And you were sixteen feet above the deck, assuming the floor I'm standing on is the deck?

A Yes.

Q So when the container moved your body described an arc over the bulwark and into the water; is that correct?

A Yes.

THE COURT: Ladies and gentlemen, I think we all understand the terms but I used a little bit of wrong terminology.

I think the hatch coaming is, in land language, part of the wall of the cargo hatch which sticks up on the deck; is that right, Mr. Heller?

MR. HELLER: Yes.

THE COURT: Then there would be some deck between the hatch coaming and the side of the ship and the railing or fence, whatever you want to call it around the side of the ship is called the bulwark.

MR. HELLER: Yes, your Honor.

THE COURT: I used bulkhead and I really meant bulwark.

Now at least we have our terms straight, so go ahead.

BY MR. HELLER:

Q When you struck the water, which part of your body struck the water?

A My right side.

Q And will you show us with your hands what you mean by your right side, sir?

A (Witness indicating)

MR. HELLER: May the record indicate the witness motioning from the right side of his head, over his shoulder and arm, down the right side of his leg.

THE COURT: All right.

Q Now, when you hit the water, do you recall what happened to you?

A It felt like I hit a stone wall, like cement wall.

Q And then what happened to you? Did you go down under the water?

A Yes, I was bobbing few times in and out.

Q And then did you finally reach the surface?

A Yes. I swallowed a lot of water and I felt very dizzy.

Q Now, did anybody do anything to help you stay afloat?

A They threw me that life ring.

Q And then what did you do? Did you hold on to the

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life ring?

A Only with one hand I could reach that ring.

Q And what did they do to help you?

A They pull me around the ship toward the shore and they pulled me out of the water.

Q Did they lift you out onto the string piece?

A Two men they grab my arms. At that time I really don't know but I felt hands around me. They pulled me out of the water.

Q Now, what did they do for you when they pulled you up on the dock?

A They put me on the pallet.

Q How did you feel then? Could you see them?

A It was very dark in front of me. I heard my name called but I didn't know who was around or how many of them were around.

Q What did they do for you on the pallet? Is that a wooden platform?

A They stretch me on that pallet and they tried to comfort me. They kept asking me how I felt, and so on.

Q Did they give you or take you to the first aid office on the pier?

A They took me to the office.

Q What did they do for you in the pier office?

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A They change my clothes first. They gave me some -- they put someoverall, dry overall on.

Q Now, where did they take you? Did you get any medical treatment?

A They took me to the hospital.

Q Before they took you to the hospital, how did the right side of your body feel? Can you describe it?

A I felt like somebody was hitting me all the time. It was almost numb from pain. My head was -- in my head I felt a throbbing.

Q What hospital did they take you to?

A In Hoboken, Santa Maria Hospital.

Q Is that St. Mary's Hospital in Hoboken?

A Yes.

Q And what part of the hospital did they take you to for this examination?

A In emergency.

Q What did they do for you in emergency?

A They took some X-rays. They gave me some pills for pain.

Q Did the pain pills make you feel any better?

A They didn't do anything for me. The pain was all the same.

Q Now, after they X-rayed you in St. Mary's Hospital,

what did they do for you then?

A They brought me home. They took me home.

Q How did you get home?

A One of the longshoremen took me home with the car.

Q When you got home, what did you do?

A I went to bed immediately.

Q Now, how long did you stay home and in bed?

A The next day I had to go to the doctor again.

Q And is that Dr. Zitani, your employer's designated doctor?

A Yes, that is him.

Q And what did he do for you?

A He put some compresses on all my right side and he put some heating pad on my back.

Q Could you describe how your right side of your face and shoulder and right arm and leg looked? Can you describe it to us?

A From here all the way, even on my head it was blue and black. All the side and the left leg inside, inside of my left leg.

Q Was that black and blue?

A Yes.

Q Now, did Dr. Zitani give you any further treatment

other than compresses?

A He gave me some pills for the pain.

Q And after he released you, did you go back to work that day?

A Oh, no.

Q You went back home?

A Yes.

Q How often did you see Dr. Zitani?

A Three or four days.

Q Now, how far apart were the treatments or examinations?

A Ever two or three days I visited him.

Q Now, how long did Dr. Zitani treat you? How many days, weeks or months?

A About two months, two and a half maybe.

Q Now, in addition at the request of Dr. Zitani did you see another doctor, Dr. Winokur?

A Yes.

THE COURT: How do you spell that, please?

MR. HELLER: W-i-n-o-k-u-r.

THE COURT: Thank you.

Q Did Dr. Winokur examine you?

A Yes.

Q Did Dr. Winokur treat you?

A He did something with the machine. I don't know what. And again he gave me some pills for the pain.

Q Did the pills help you in any way, reduce the pain?

A For a short time, yes, but that pain started again.

Q And what part of your body was in pain?

A My head was the worst part, and my shoulder, too, the back, and my heart was very unsteady.

Q I'm sorry, I didn't hear that.

A The heart wasn't steady, the heart beating I mean. My stomach hurt me very much because of that big quantity of water I swallowed at that time.

Q During this two and a half or three months home what did you do?

A I went to Dr. Zitani after three months and he sent me back to work.

Q Now, did you go back to work at the company doctor's request?

A Yes.

Q Now, during this three month time at home, did you go to any social functions or socialize or visit with your fellow countrymen or longshoremen? What did you do?

A They asked me to go but I simply couldn't. I

couldn't because the pain was all the time there. My head was very dizzy. I couldn't even lift my eyes and I couldn't go. Even I went before, but now I was home all the time in bed or out. I couldn't even walk.

Q Now, at the end of the three months how was this pain? Had it disappeared on the right side of your head, right shoulder and arm and leg?

A No. They diminished but I felt them all the time, felt that pain all the time.

Q Did you tell the doctor you didn't want to go back to work?

A I told him I couldn't but he said I had to.

Q And you went to work?

A Yes.

Q Now, where did you go to work?

A In Newark.

Q Is that in the hold of a ship?

A That was on the dock. I didn't go on the ship. That was on the dock.

Q Now, how long did you work?

A That day I worked but I went home. I left. I couldn't any more.

Q Did you come back to work then thereafter?

A Oh, no. I couldn't move. My head was really --

my head hurt really bad.

Q You went home. Now, how long did you stay home?

A Altogether you mean?

Q No. After the doctor sent you back to work, how long did you stay home then?

A Seven months.

Q So you only worked one day and you then went home seven months, is that correct?

A Yes.

Q Now, while you were home seven months did you get any medical treatment from the company doctor?

A No. I went private, to the private doctor.

Q And what did he treat you for?

A My back was very bad and he treated my back and I asked for more pills to kill the pain.

Q Now, at the end of that seven month period, making a total of ten months, did you return to work?

A Yes.

Q During the seven months at home, what did you do? Did you visit your club, did you attend any family social events?

A I used to go to my club before, very often. I used to play cards with my friends and I have them over to my house and we used to have some home parties and have

glass of beer or so, but now in those ten months I haven't even seen them and I didn't go any place. I didn't go any place, I didn't visit anybody and I didn't leave the house except for going to the park a short distance from home.

A short time ago my niece, daughter of my sister, got married. They want me to attend that wedding but I simply couldn't make myself go.

Q Since 1972, that would be about April or May, you have been working as a longshoreman, haven't you?

A Yes.

Q But how do you feel now with regard to the way you felt before the accident? And I mean how does your other life feel, the life away from working in the hold of a ship or on the dock?

A When I come back from work I don't want to see anybody. Everybody and everything goes on my nerves, and those dizzy spells I can't get rid of them. And when I come from work I don't even want to eat. I just go to my bed. My daughter is married, she has children. Whenever they come visit me I just simply throw them out. I can't stand the noise.

Q How many grandchildren do you have?

A Two.

Q Now, how old are they?

A One is five and one is three. The little girl is three, the little boy is five.

Q Now, did you attend the christening of the five year old?

A Yes, I attended that christening, yes.

Q How about the three year old one?

A No. I couldn't make myself.

Q Now, before your accident, did your club, that is the club which all the longshoremen belong to, did they have weekend picnics or parties?

A Yes. We have a saint, St. Nicholas. There was a big celebration. All the weekends all we have are big dances. We celebrate our saint. We used to go and attend those dances or picnics but not any more.

MR. KAIN: If your Honor please, I think we have been more than forbearing with counsel leading the witness. From here on in I would ask the witness volunteer rather than to suggest answers.

THE COURT: You object to a specific question if you feel it is leading.

Go ahead, Mr. Heller.

Q Yow is your sleep, has your sleep been affected since the accident?

A Yes, yes. I wake up almost every night very often.

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My body all shaking. Or I even lose consciousness. The last time I remember was sometime in March. I just fainted.

Q How about your relationship with your wife and your other children, how do you get along with them in the house?

A I can't stand them. I'm so nervous I can't stand the sight of them. It hurts me very much to behave like that but I simply can't help that. My stomach is so uneasy, I can't eat, I can't go any place. Wherever they want to go they push me.

MR. HELLER: No further questions, your Honor.

THE COURT: Mr. Kain.

CROSS EXAMINATION

BY MR. KAIN:

MR. HELLER: Your Honor, may I give the witness a glass of water?

THE COURT: Certainly.

(Pause)

Q Mr. Picinich, do you today have a clear recollection of the cargo that youwere discharging on the day of your accident?

A I remember those containers. They were 20 feet long and eight wide and eight high.

Q Well, Mr. Picinich, you remember testifying at my

office on November 20, 1973, and you remember coming into my office and being asked certain questions and giving certain answers?

A I don't remember.

Q And at that time did you know how high these containers were and how wide these containers were?

A I don't know. I don't remember.

Q May I have the answer?

THE INTERPRETER: May I repeat the question to him?

MR. KAIN: Please do.

A I don't remember.

Q Have you refreshed your recollection with anything since you were in my office concerning the sizes of these containers?

A I don't remember being in your office.

Q My question is did you look at anything since you were in my office in November 20, 1973, that would help you remember the size of these containers.

MR. FRIEDMAN: Your Honor, I'm sure Mr. Kain is overlooking his premise.

THE COURT: One lawyer at a time.

MR. HELLER: Your Honor, I will note an objection to the question.

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THE COURT: What is the ground of the objection?

MR. HELLER: The witness was never in the office. The question starts on an improper premise.

THE COURT: Can I see the deposition?

MR. HELLER: Yes, your Honor (handing).

MR. KAIN: I'm sorry, your Honor, it was taken in the Southern District.

THE COURT: All right. Start over. I take it it is agreed that the deposition -- you ask your questions.

Q Mr. Picinich, do you recall being in this courthouse on November 20, 1973, and being asked certain questions and giving certain answers about this accident?

THE INTERPRETER: May I know the date, please? What date is that, sir?

THE COURT: November 20, 1973. The question is whether he remembers.

THE INTERPRETER: Only I didn't hear, your Honor.

(Pause)

A Yes, I remember that.

Q And at that time did you know the size of these containers?

A At that time I wasn't sure, but since then I talked to my partners, to longshoremen, and they told me the exact size.

Q Since you testified in the courthouse here you talked to somebody and they told you how big these containers were; is that right?

A Worked with those containers again, so I know how big they are.

Q Let's go back to July 12, 1971, the day of your accident. Were you sent down to pier B, Hoboken, from the waterfront commission hiring hall?

A Yes.

Q And that meant that you got there sometime after this gang started to work, sometime after eight o'clock; isn't that so?

A Yes. It takes time to get there.

Q I'm sorry, I didn't get your answer.

A It takes time to get there, yes.

Q What time did you get down to pier B, do you remember, approximately?

A That was ten after eight approximately.

Q And at the time you got down to this ship were the other longshoremen in gang already on board?

A They were some of them who were the regulars.

Q They were already on board?

A Yes.

Q Could you tell me whether number five hatch was

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rigged for discharge at the time you came on board?

A Yes.

Q It was already rigged?

A Yes. The hatch was closed. The container was on the top.

Q Were the booms spotted in position on the ship?

THE INTERPRETER: Booms what?

Q Were the booms spotted in position on the ship?

A Yes, they were.

THE COURT: I would like to take our afternoon recess now. We will take about ten minutes.

(Recess)

(In open court - jury present)

CROSS EXAMINATION CONTINUED

BY MR. KAIN:

Q When you came down from the Waterfront Commission hiring hall on the morning of the day of your accident, did you walk in?

MR. HELLER: Objection, your Honor. There is no proof that he came from the hiring hall. He testified when he came directly to pier C, the --

THE COURT: Just make an objection. The objection is overruled.

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MR. HELLER: All right, your Honor.

A I came right to pier B that morning.

Q You didn't go from the hiring hall?

THE INTERPRETER: I didn't understand myself.

MR. KAIN: I asked the witness did he go from the hiring hall to pier B.

A Yes.

Q My question was how long did it take you to walk from the hiring hall to pier B.

A Seven to eight minutes, the most ten.

Q When you got down to pier B, did you report to a particular hatch boos, a Mr. Santoro?

A I reported first to get a ticket in the office and then on the ship itself I reported to Santoro.

Q And when you reported to Santoro, did he tell you what to do?

A Yes, the four of us he told us what to do.

Q And did he speak to you in Italian or in your native language?

A Half Italian, half English.

Q Do you understand Italian, Mr. Picinich?

A Yes, I do.

Q When you got to the ship you were assigned to hatch number 5, is that correct?

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A Yes.

Q And at the time you came on board I believe you told us the longshoremen had not started to discharge any containers; is that correct?

A I think so, no.

Q Do you recall how many containers were on the inshore side of the ship, the side next to the pier?

A I don't remember.

THE COURT: Just one second.

Mr. Heller would like to close the window because of the noise. We will try it. It may get pretty stuffy.

Could the reporter read the last question and answer.

(Question and answer read)

Q Well, do you have any present recollection as to whether there were any containers on the side of the ship next to the pier at number five hatch?

A I don't remember.

Q Was this the first time you had worked on a ship discharging containers?

A No, that wasn't first time. I was discharging before. I was working on discharging before on pier C.

Q Had you discharged containers on a great many occasions before the day of your accident?

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A No. I was mostly in the hatch itself.

Q And the Concordia Viking was not a container ship, was it, Mr. Picinich?

A No.

Q She was a dry cargo ship, was she?

A Yes.

Q Now, on the day of your accident, how did the longshoremen lift these containers from the deck of the Concordia Viking?

MR. HELLER: Objection. There was no testimony. The question is ambiguous because the one container was being lifted at the time of his accident. He is asking how did the longshoremen lift containers.

THE COURT: Let me hear the question.

(Question read)

THE COURT: Why don't you rephrase it.

Q On the morning of your accident, how did the longshoremen, what did they use to lift the container which you said was being lifted at the time of your accident?

MR. HELLER: Your Honor, may I make another objection to this question? The longshoremen didn't lift it. The ship's gear. I hope the jury won't have the idea the longshoremen lift it. It is the ship's gear.

MR. KAIN: If your Honor please, I asked the wit-

ness what the longshoremen used to lift the container. I would ask your Honor to please instruct Mr. Heller not to cue the witness.

MR. HELLER: Your Honor, I object.

THE COURT: Excuse me, Mr. Kain. I think the question does imply that the operation of lifting that container was conducted by the longshoremen. If that is a wrong assumption --

MR. KAIN: It most assuredly is not, if your Honor please, as Mr. Heller well knows. This entire operation is performed by the longshoremen. I think that is conceded.

MR. HELLER: I don't understand.

THE COURT: Who is running the crane, whatever you call it? The ship's personnel?

MR. KAIN: The longshoremen.

THE COURT: Do you concede that the longshoremen were running the crane that operated the boom?

MR. HELLER: Yes, your Honor.

THE COURT: Then the objection is overruled.

That is what I wanted understood, your Honor.

MR. KAIN: May I have the question read back?

THE COURT: Yes.

(Question read)

A With the boom.

Q And could you tell me how many ship's booms there were at the number five hatch of the Concordia Viking?

A Two on each side, two toward aft and two toward the -- on the other side.

THE COURT: Wait a minute, two towards the bow or front?

THE INTERPRETER: Yes, toward the front. I forgot that.

Q Is it your testimony, Mr. Picinich, that there were four cargo booms at the number five hatch of the Concordia Viking?

A Yes.

Q That is two at the forward end of the hatch and two at the after end of the hatch?

A I am not so sure there were two on each side or just one on each side. I am not so sure.

Q Well, do you remember how many of these ship's cargo booms were being used at number five hatch by the longshoremen at the time of your accident?

A Two booms.

Q That is your recollection, that there were two booms?

A We worked with two booms on it.

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Q Could you tell me where the end or the head of these two booms you were working with was placed?

A They were exactly the same way as on the other ship.

Q Well, let me ask you, first of all these two booms you say you were using, where were they, the front end of the hatch or the back end of the hatch?

A They were both on the same side.

Q One on the forward end of the hatch and one on the after end of the hatch?

A No. One was on the left side and the other one was on the right side.

Q And my question is where were these two booms you say you were using located? Were they at the front end of the hatch or the back end of the hatch?

A I am not so sure.

Q Were these booms used as swinging booms? Do you know what I mean by swinging booms?

A Yes, they are swinging. The way how the deckmen locate them or control them, they swing them from left to right.

Q Is that how they were being operated on the day of your accident? Were they being operated as swinging booms? By that I mean when a draft is picked up, container

is picked up, the boom swings over to the pier and discharges it? Is that the way they were doing it on the day of your accident?

A Yes. They were lifting and going toward the dock.

Q Was the boom itself swinging or was it just a container going over to the dock?

A I really don't know. The deckmen know better how to do it.

Q I am trying to test your recollection, Mr. Picinich. Let me ask you, do you know what a Burton Rig is on booms? That is B-u-r-t-o-n Rig.

A No.

Q Well, in your experience as a longshoreman, have you operate or worked aboard ships where you have up and down boom over the hatch and a Burton boom over the pier? Have you operated or worked aboard ships where they had booms rigged like that?

A Yes.

Q And will you assume with me that when I refer to a Burton Rig that is what I am referring to. Now on the day of your accident, is that the type of rig you had? Did you have a boom over the pier and another one over the hatch with single cargo falls married or shackling to a particular

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hook?

A Yes.

Q Do you know what a house fall is?

THE INTERPRETER: House call?

MR. KAIN: House fall.

A No.

Q Have you worked aboard ship where instead of a Burton boom over the pier, they have a block up on the pier shed and a cargo fall from the inshore winch runs through the block on the pier shed and back down into a single cargo hook?

A No, I don't know. I'm not sure that I saw that.

Q Well, do you have any present recollection at all, Mr. Picinich, as to the type of rig of the cargo handling gear on the Concordia Viking on the day of your accident?

A No.

Q Now, do you have a recollection of the containers on which you were working at the time of your accident?

A Yes, I remember. They were on top of each other.

Q And could you tell me -- I think you have already told us they were 20 feet by eight feet wide by eight feet high; is that correct?

A Yes.

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Q And if you know, were the containers on which you were working on the day of your accident empty or full?

A It was empty.

Q And could you tell me what material these containers were made of?

A I don't know the material. I remember only the red color.

Q Do you remember whether they were plywood, canvas, aluminum, steel? Do you have any idea what the material was?

A It looked to me like aluminum.

Q Could you tell me what these containers weighed, these 20 by 8 by 8 containers?

A Who knows? I don't know.

Q Do you know if they were heavy?

A I don't know.

Q Now, you mentioned, I believe in answer to Mr. Heller's questions, that you and a partner had hooked up one of these containers; is that correct?

A Yes.

Q And could you tell me how you hooked these containers up or how you hooked that container up, you and your partner?

A There were four hooks. Two of them I attached

to that container and the other two my partner did.

Q Did you and your partner attach these hooks in the corner casting of the container that you fastened them to?

THE INTERPRETER: Did they what?

MR. KAIN: In the corner castings of the container which you were attaching.

A They were holes, they were castings in the container and we put the hooks into them.

Q And these containers that you talk about with the holes, that is what I mean by corner castings. Is that what you call them, corner castings?

A No.

Q On the four upper corners of this container, are there two holes on the side and a hole in the side, in the casting?

A Yes.

Q That's correct, too, one on each corner?

A Each corner has three holes, one on the top and two on each side.

Q ...at is just what I asked you.

Now, in hooking up these containers, will you tell me how you did it? How did you hook it up? What hole did you put it in?

A I put the hooks into the casting from sides.

Q Is it your testimony, Mr. Picinich, that that is the correct way to hook up one of these containers?

A I'm not sure now. I know there were three holes. In which one I put those hooks I really don't remember.

Q Is there only one proper way for you to hook up a container in the manner that you and your partner were doing it?

A The best way to hook them is from side. But if you can't, then you hook them on the top.

Q Isn't it true, Mr. Picinich, that before you can get slack in a wire to hook into these containers, the winch operator has to lower his cargo hook or his shackle; isn't that so?

A Yes.

Q So that when you put these hooks in, the wires to which the hooks are attached are slack; is that right?

A The deckman watches how slack they should be.

Q I say in order for you to hook in on this container, your hook has to be slack, your hook wire, doesn't it?

A Yes.

Q Would you tell me, Mr. Picinich, if you are using slack hook wires to hook in on the side of these corner

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casrings, can you reach both sides simultaneously? They are eight feet apart, aren't they?

MR. HELLER: May I object to summations, the two assumptions in the question?

THE COURT: Let's hear the question.

(Question read)

THE COURT: I will overrule the objection. I don't think there is an assumption. I think the question is can you reach.

Go ahead.

MR. HELLER: Is this question with regard to that container or any container, your Honor?

THE COURT: Please, Mr. Heller. The objection is overruled.

A Yes, I do that one after the other.

Q You do it one after the other; is that correct?

A Yes.

Q And you do that before the winch operator takes any strain on these hook wires at all; isn't that so?

A Yes.

Q The strain is taken on all four of these hooks by the cargo winch at the same time; isn't that so?

A Yes.

Q And if you hook in with one of these hooks on a

side casting, what keeps the hook in the side casting while you go over to the other side and hook on the other?

A It is hooked and it is lying right on the container and stay there until I hooked the other one.

Q Hooked into the side and lying there; is that your answer?

A Put the hook inside and secure it somehow to stay there.

Q You say "somehow," Mr. Picinich. How do you secure it when you put it inside?

A The hook hangs on that sharp end. It hangs.

Q I am only talking about the container hooks that you were talking about. These four hooks, you said one goes in each corner of the container. Is there something other than this hole in the casting to which this container hook hooks on?

A No.

Q When you got on this ship were there any turn buckles in place on any of the containers at number five hatch?

THE INTERPRETER: I'm afraid he doesn't know what turn buckle is and I'm afraid I don't know either.

Q Didn't you in answer to one of Mr. Heller's questions tell him there were no turn buckles attached to

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these containers?

THE INTERPRETER: Those were shoes; is that it?

MR. KAIN: You are only translating, please.

THE INTERPRETER: I am asking you to explain to me.

Q My question is didn't you answer Mr. Heller that there were no turn buckles on any of these containers.

A There were not.

Q You don't know what a turn buckle is; is that the answer?

A Yes.

Q That is your answer, you do not know what a turn buckle is?

A Yes. But when I explained to him any word. He told me himself that he called them shoes.

MR. KAIN: Your Honor, may I ask that the interpreter interpet only my questions?

THE INTERPRETER: I am afraid I did.

THE COURT: What you said last you were interpreting what the witness had told; right?

THE INTERPRETER: Then I asked him whether he knows what those turn buckles are.

THE COURT: What you are saying must be what the witness tells you.

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THE INTERPRETER: Exactly. He told me we call them shoes.

THE COURT: I want the last question and answer -- the last answer of the witness read, please.

(Question and answer read back)

THE COURT: Were those your words?

THE WITNESS: Not mine.

THE COURT: The witness was saying that?

THE INTERPRETER: Yes.

(Testimony read)

MR. KAIN: I will repeat the question.

Q Mr. Picinich, do you know what a turn buckle is?

A Shoes?

THE COURT: No, do you know? Please don't ask questions of the lawyer. Do you know what a turn buckle is?

THE INTERPRETER: I just translated what he answered.

THE COURT: I understand.

A Yes.

Q Then my question is when you arrived at number five hatch, the first time you got there on the morning of the day of your accident, were there any turn buckles in

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place on any of the lashings of containers at number five hatch?

A No.

Q Were there wire lashings affixed to any of the containers at number five hatch when you first got there?

A No, they were loose.

Q They were loose but they were still affixed to the containers; is that your testimony?

A That lashing was on the top of the container going through those holes on the side of the containers.

MR. LEONARD: May the record indicate the witness made a downward motion with his fingers as he gave the answer.

THE COURT: I don't know what that means.

Q Could you tell me what these lashings were made out of?

A That is wire.

Q Wire rope?

A Yes.

Q And do you remember what size wire they were?

THE INTERPRETER: What side?

MR. KAIN: What size wire.

A They was thicker than my thumb.

Q May I see your thumb? Could you hold it up?

A (Witness complies)

Q That is about three-quarters of an inch to an inch. That is about how thick that wire was?

A Just a little bit more than my thumb.

THE COURT: About three-quarters of an inch.

Q And was this wire that you say was on the containers, does that go through these corner castings, these holes on each corner of the container?

A Yes.

Q And did the two bitter ends or the loose ends hang down alongside the container?

A Yes.

Q Were there clips, any wire clips on these two ends that hung down from the container?

A Nothing was there.

Q Just the two loose ends of the wires hanging down; is that correct?

A Yes.

Q Now, in freeing these wire lashings which pass through the corner casting and the ends hung down, was it possible to stand on deck and pull the wire through the casting?

MR. HELLER: Your Honor, I don't understand the question.

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THE COURT: I do. Overruled, Objection overruled.

Let's read it again.

(Question read)

A I'm not sure. It is possible.

Q Did any of the longshoremen attempt to remove lashings in this fashion that day before your accident?

A No, nobody did.

Q Now, I think you told us at the time of your accident there were four longshoremen working on the offshore or port side of the ship; is that right?

A Yes, four of them.

Q And the only ones who were working on top of the container were you and another man that you described as your partner; is that correct?

A Yes.

Q What was your partner's name, do you know?

A I don't know. I forgot his name.

Q While you and your partner were working on your container, do you know what the other two longshoremen were doing on the deck on the offshore side?

A They were watching us. They were watching us and waiting for the container to be lifted.

Q What container were they waiting to see lifted?

A That was the container toward the aft and next to the coaming, the hatch.

Q Did these two longshoremen have anything to do in connection with the lifting of this container?

A No. They don't do anything. They just watching. They were just down there watching to have that container removed.

Q But they had nothing to do with lifting it or moving it; is that right?

A They did only one thing. They were moving those ladder that we were climbing on to get on the top. They were moving from place to the other.

Q You say they were moving a ladder; is that what you said?

A They removed those ladders from that container, not to be in the way when the container was lifted.

Q Now, I think you said that the first container you worked on was the after inboard container, next to the hatch coaming; is that correct?

A Yes, that's correct.

Q And when you first got up onto this container, were there lashings on this container?

A Yes, yes.

Q And were there lashings at all four corners of

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this container?

A Only in one, on one.

Q On one corner?

A Yes.

Q And do you have any recollection as to which corner it was?

A Toward the forward.

Q Was it forward toward the hatch coaming or was it upboard, away from the hatch coaming?

A Toward the water, the right side.

Q So that would be the forward outboard corner of the four corners; is that right?

A Yes.

Q And you couldn't tell, could you, when you got onto that container where on deck those lashings had been previously secured, could you?

A They were not secured.

Q I know they weren't at the time you got onto the container. My question is when you got on the container and these wires were hanging loose from the container there was no way in which you could determine where these wires had been lashed before the lashings and the turn buckles were taken off; is that correct?

A They were loose on the top when I arrived there

and I have no idea how they were attached to the deck.

Q Thank you.

Now, could you tell me, did you notice if you recall any lashings on the bottom containers, this bottom deck of the containers you say were there?

A I don't remember.

Q You don't remember?

A I don't.

Q You do remember, though, checking these containers to be sure there were no shoes or stacking plates between the containers; isn't that so?

A I noticed that. The first time I arrived on that ship I noticed there were no shoes on those containers.

Q You noticed there were no shoes; is that correct?

A No, there were not.

Q And that means that you looked between the corner castings, the ends of these containers to see there were no shoes; is that right?

A Everybody noticed the same thing, there were no shoes on those containers.

Q You are not answering my question.

May I have an answer to my question? Read it back, please.

THE COURT: I think we have to have a window open

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a little bit.

MR. FRIEDMAN: I didn't hear that.

THE COURT: Mr. Heller closed the window, which is fine, but we will have to have it open a little bit. It is getting awfully stuffy.

(Pause)

MR. KAIN: Read the witness back my last question.

(Question read)

THE INTERPRETER: Should I ask that question?

MR. KAIN: Would you, please.

A You could see that -- I mean we could see when we first approached that those containers, we noticed there were no shoes.

Q That is my question. You can see easily by looking at it that there were no shoes between the upper container corner casting and the lower container corner casting; is that right?

A Yes.

Q Were there any shoes between the deck and the bottom casting on the lower containers?

A No, there were not.

Q And when you looked and saw there were no shoes between these containers, at any place either between the upper and lower or between the lower and the deck, did you

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also notice that there was dunnage between the lower container in the deck and the upper and the lower container?

A I'm not sure I saw dunnage.

Q Do you know what dunnage is, Mr. Picinich?

A Yes, I know.

Q Would you tell me what you understand by dunnage?

A Yes, I do.

Q Would you tell me what it is then, please.

A Dunnage are boards, sometimes four, five feet long. Depends.

Q It is wood, is it?

A Yes.

Q And isn't it random lengths, various lengths?

A Some of them are long.

Q Some are long, some are short?

A Some are long, some are short, some thick, some thinner.

Q Is it various widths?

A Yes. They are different widths.

Q And isn't it true, Mr. Picinich, that all dunnage is approximately one inch thick?

A That is not true.

Q That is not true. Is it possible to have dunnage that is four inches thick?

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A I don't know.

Q How thick is one of these stacking plates or shoes which you referred to?

A It is approximately that wide but longer than this cup (indicating).

THE COURT: What does the record show? He indicated something about a cup.

MR. KAIN: I was going to pursue it. I thought your Honor was saying we were stopping for the day.

THE COURT: Let's get that measurement established.

Q Is this shoe you are referring to, Mr. Picinich, is that a small square piece of metal; is that what it is?

A Smaller (indicating).

Q Isn't it true this piece of metal is very thin and it has a projection on top and a projection on bottom and the top piece fits in the container above and the bottom piece in the container below; isn't that what you mean by a shoe or stacking plate?

A Yes, exactly. They go through those holes and they can --

Q When it is in place between the two containers, all you can see is a very thin piece of metal plate; isn't that true?

A Oh, no. You can see very easily.

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Q My question is when a shoe or a stacking plate is in place between two containers, one on top the other, when you look at that container from the side, isn't it true all you can see is the thin plate between the upper container and the lower container?

A You can see that shoe very easily. It is visible.

Q What is visible?

Would you give me that answer again, please?

A That shoe is easily visible.

THE COURT: That is not the question. Mr. Kain is asking you what it is you see. Now, what is it that you see? Do you see just a thin plate of metal, if you are looking at it and the shoe is in place and there is a container above and a container below, and you are looking at this from the side, do you merely see a thin metal plate?

THE WITNESS: On those containers, the very old ones, you can easily see those shoes, whether they are in or not.

THE COURT: We have had this about five times. The question is what do you see? You describe it.

THE WITNESS: When those containers stand like that I can't tell whether the shoes are on or not. Those are old containers and their shoes are very visible.

THE COURT: We have had this about five or six times. Do you want to pursue it tonight?

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MR. KAIN: I was thinking perhaps, I don't know whether it is possible, perhaps we might get one for illustration purposes. Perhaps we might get one for illustrative purposes sometime during the evening and maybe he would better understand what we are talking about.

THE COURT: We will recess until ten o'clock tomorrow. No discussion about the case among yourselves with your family or friends, please.

(Adjourned to October 7, 1975, at 10:00 a.m.)

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rd/lf/86

ANTON PICINICH

vs.

CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP COMPANY, INC.

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71 Civ. 5357

SKIBS A/S SAMUEL BAKKE

vs.

JOHN W. MC GRATH CORPORATION

October 7, 1975

(In open court - jury present)

THE COURT: Anton Picinich, resumed.

A N T O N P I C I N C H, resumed.

CROSS EXAMINATION CONTINUED

BY MR. KAIN:

THE COURT: Do you have that plate with you?

MR. KAIN: No, I don't, your Honor.

THE COURT: I think it is very difficult for the plaintiff with this language difficulty trying to describe measurements of apparatus. Perhaps you could have some pictures.

Q Mr. Picinich, when you boarded the Concordia Viking and went to number five hatch on the morning of July 12, '71, you got up on top of these containers with a ladder?

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A Yes.

Q And of these four top containers you got up on the after container, the one at the back next to the hatch coaming; is that correct?

A Yes.

Q And at the time you got up did your partner also go up at the same time onto these containers?

A Yes.

Q And the two other men working on that side, two other longshoremen, they stayed down on the deck; is that correct?

A Yes.

Q And you told us yesterday, did you not, that all of these lashings had been loosened by the time you came on board; is that correct?

A Yes.

Q So that none of these containers were lashed together; is that correct?

A No.

Q It is not correct or none of them were lashed together?

A They were loose and we were trying to throw them out or away.

Q Well, if they were loose then the lashing wires

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weren't in place and tightened down. That is what I mean by lashed together; is that correct?

A The lashing was on the container loose. They were not tied together.

Q They were not tied together?

A Right.

Q Do you remember who operated the cargo winches that supplied the power for raising these containers?

A I don't know.

Q Was it a longshoreman, do you know?

A I think it was a longshoreman.

Q If you know, were there any crew members working with your gang in the discharge of its cargo?

A No.

Q There were none?

A No.

Q And you didn't get any orders from any of the ship's officers as to how you were to do this work that Mr. Santoro assigned you to, did you?

A I didn't see any officer around.

Q My question is you didn't get any orders or any instructions from any of the ship's officers; is that correct?

A I didn't. No, no officer, no instruction.

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Q Now, this first container that you and your partner climbed up onto, the back container or the after container next to the hatch coaming --

A Yes.

Q -- did you have to remove wire lashings from the corner castings of that container before you put the hoisting hooks in?

A There were no lashings on that container.

Q No lashings in place on that container. So if I understand you correctly, all you and your partner had to do was affix these hooks that you told us about to the corner castings; is that correct?

A Yes.

Q And once these hooks were affixed to the container, hooked up to the container, what did you do?

A I stepped on the other container and my partner in front of me on the second one.

Q Well, did you stay on top of the container that was hooked up to the cargo winch until a strain had been taken on the cargo fall? Do you know what I mean by that?

A Soon we put the hooks on the place we moved from that container on the next one.

Q When you moved from that container were the hooks or were the wires for these hooks still slack?

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A They were slack. When we stopped off that container, on the next one, then the wire go and the hooks were stretched.

Q But when you first stepped --

THE COURT: He has already said that. He said they were slack when they stepped off.

MR. KAIN: I misunderstood then.

Q Had you received any instructions from anybody as to which container you were to step off to?

A No, nobody did.

Q Were you ever told during the years you worked as a longshoreman that in situations such as you have described on the Concordia Viking, that you should not step to a container within the plane of the falls?

THE COURT: Let me hear the question.

(Question read)

A I don't know. I don't remember anything.

Q Well, on the morning of your accident, Mr. Picinich, was it your impression or your opinion that it made no difference as to which of these containers you stepped on?

A It doesn't matter on which one I stepped. In my opinion that is it.

Q So if I understand you correctly, there is no right container to step on in this situation or wrong

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container to step on; is that correct?

A Sure. It is no difference.

Q Now, when you stepped to this offshore container, upboard container, immediately before your accident, what did you do?

A I was trying to throw away those lashing whatwere on the top.

Q And this lashing that you are referring to was the outboard lashing, the lashing nearest to the water in the forward corner casting of that container?

A Yes.

THE COURT: Can I hear the question and answer, please?

(Question and answer read)

Q I think you told us yesterday this was the only lashing on that container to which you stepped?

A Yes.

Q And when you stepped onto this container, in order to draw out, as you put it, or to pull loose this lashing, could you tell me how you did it?

A (indicating)

Q Indicating hand over hand. Did you bend over in order to pull this hand over hand?

A Yes, I was bent slightly away from the sea, away

from the water.

Q Well, as you were bending over and pulling this out, were you facing inboard towards the hatch, were you facing towards the forward or front of the ship, or the aft of the ship or towards the water?

A I was looking at the lashing.

Q Well, could you tell me in which direction your body was facing while you were looking at the lashing?

A Toward the water.

Q While you were pulling up this lashing was your partner on the container forward of where you were standing doing anything?

A I don't know what he did.

THE COURT: I am trying to get the picture. Your question confuses me, Mr. Kain. I thought he said that he was working on the outboard lashing at the forward corner.

MR. KAIN: That is correct, sir. Facing towards the water.

THE COURT: Now, your question was what was your partner, who was --

MR. KAIN: On the container ahead of the container on which he was standing, what was he doing?

THE COURT: Let me clear that up. I didn't understand that.

Was your partner on the container in front of the container you were working on?

THE WITNESS: Yes.

THE COURT: All right. I hadn't gotten that. Go ahead, Mr. Kain.

Q While you were pulling on this lashing what, if anything, was happening to the container which you and your partner had just hooked up?

A That container I was on before was pulled up slowly and I could hear it was scraping on my container I was standing on. And when it cleared, all of a sudden the container I was standing slid on the empty space. It was that container before.

Q Was there another container stowed beneath the container which was being raised at the time of your accident?

A No, nothing.

Q Is it your testimony that the container being raised was the bottom container on deck, on the after inboard side next to the hatch?

A The container that was lifted was the upper container, not the bottom.

Q And there was a container underneath it before it was lifted; is that right?

A Yes.

Q And there was also a container under the container on which you were standing and pulling the wire at the time of your accident, was there not?

A Yes.

Q Now, if I understand your testimony correctly, you say that as this container was being raised, when it got above the level clear of the container on which you were standing, the container on which you were standing suddenly slid inboard; is that correct?

A Yes. When it cleared my container slid in that empty space.

Q Slid into the space formerly occupied by the container which had been raised; is that what you mean?

A I don't know how far it went but I found myself in the water.

Q Do you know what caused it to slide, Mr. Picinich?

A I only know it slid. I don't know why. It didn't have those shoes.

Q Is it a fair statement you don't know why this container slid, as you say it did?

A I think it did not have these shoes. It was not standing firm.

Q You told us yesterday you didn't know whether

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there was dunnage between these containers, did you not?

A When I first came to the ship, on the ship I didn't see those dunnage but I saw that shoes were not in the right place.

Q Did you see any shoring on the bottom containers or chocking on the bottom containers?

A I don't know what is that.

Q Were they chocked in with pieces of wood between the hatch coaming and the bottom container and the outboard container in the ship's bulwark or rail?

A I didn't see any of those.

Q Well, let me ask you, Mr. Picinich, do you know what I mean by the expression "camber," the word camber?

A No.

Q Did you tell us yesterday you went to sea when you went to Yugoslavia?

A Yes.

Q And what type of ship did you go to sea on in Yugoslavia, or was it a ship?

A That was a little, very small boat.

C A boat?

A That was a motor boat, small motor boat.

MR. HELLER: To correct the record, he said he was

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a fisherman.

THE COURT: Yes, I think that is right. He said he was a fisherman.

Anyway, you go ahead, Mr. Kain. That is still, I take it, going to sea.

Q Well, since you started work as a longshoreman, that was how long ago?

THE INTERPRETER: I'm sorry, I didn't hear you.

Q How long ago did you start work as a longshoreman in the United States?

A Thirteen years. That is from '63. How much is it?

Q Since 1963. And you have since 1963 worked on a great many cargo ships, have you not?

A Yes.

Q And these cargo ships that you work on, you have worked on, did the decks of these ships slant slightly from the middle or the center of the ship out to the ship's rails?

A I really don't know. I don't know.

Q Have you been on these cargo ships when there was rain, when it was raining on deck?

A Sometimes yes.

Q And you noticed, did you not, that the rain drained down the deck to the scuppers on either side of the

ship?

A I don't know that.

Q At the time of your accident, did anything strike the container on which you were standing?

A No, nothing but only when the container was being raised it scraped the side of my container I was standing on.

Q The container being raised scraped the inboard side of the container on which you were standing; is that right?

A Yes.

Q And a blow to the container on which you were standing from the inboard side would have driven the container out towards the water, wouldn't it?

A That container I was standing on didn't move while it was scraped by the other container.

Q If I understood you correctly it was just when the one being raised finally cleared the container next to the one you were standing on, the one you were standing on suddenly moved inboard, is that right, or in towards the hatch?

A Yes, it did, slid into that space.

Q You have no idea what made it slide, is that correct, except for these lack of shoes you talk about?

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MR. HELLER: Your Honor, that is the sixth time Mr. Kain asked the same question.

THE COURT: It is getting a little repetitious. I will sustain the objection.

Q You have seen a great many containers, haven't you, since you have been a longshoreman?

A I don't work on those ships who have containers. I usually work in the hatch.

Q Well, do you have a recollection of what a container looks like? Do you know what a container looks like?

A Those containers I was working that morning, they were around 25 feet long, eight high and eight wide.

Q And how about the bottom one or one of these containers?

MR. HELLER: Is that a question, your Honor?

THE COURT: What do you mean what about them? What do you want to know?

MR. KAIN: I want to know if he knows what it looks like.

THE COURT: Ask him that.

Q Would you tell me what the bottom of a container looks like?

A It was the same as the one I was standing on.

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Q Well, let me ask you, Mr. Picinich, isn't it true that the bottom of a container has four corner castings which support the weight of the container, rather than a flat bottom that goes entirely around the container?

MR. HELLER: Is Mr. Kain talking about that container or other containers on the ships?

THE COURT: He is talking about a container.

MR. KAIN: Talking about containers in general, if your Honor please. Any container.

THE WITNESS: Yes, they have those castings where you put the shoes in.

Q My question is: isn't it true, Mr. Picinich, that the weight of a container is carried on four corner castings that project down, rather than a girder or beam running entirely around?

THE COURT: It is so torturous. I assumed there were plenty of pictures available and you wouldn't have to struggle with somebody who really doesn't speak English very well to get descriptions or have him understand your questions. Can't we just have some pictures?

MR. KAIN: I withdraw it, if your Honor please.

THE COURT: I'm sure after we get pictures in, if there are further questions you could recall Mr. Picinich.

Q Now, Mr. Picinich, at the exact moment this

container moved you were pulling in the opposite direction from which you fell; isn't that true?

A I was facing that container that was pulled.

Q You were facing the water and you were bent over pulling this wire; is that correct?

A I was looking both ways, here or there.

Q But your body was facing towards the water and you were pulling the wire this way (indicating); is that correct?

A I was in the middle of the container and I could see the water.

Q You were facing towards the water, the direction in which you fell; is that correct?

MR. HELLER: Your Honor, this is repetitious. This is the fourth time.

MR. KAIN: I'm not getting an answer, if your Honor please.

THE COURT: It seems to me, isn't it correct that his testimony thus far is that he was standing in the middle of the container, he was pulling on the lashing from the forward outboard casting; he was facing the water and isn't it true he said that several times, Mr. Heller?

MR. HELLER: Four times.

THE COURT: I think we can take that as a state-

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ment of his testimony. And if he fell into the water, he fell in the direction of the water. We have that now.

Q When you fell over the ship's side, did you fall head first, if you know?

A I don't remember.

Q Do you remember what the space was between the outer side or the outboard side of the container on which you were standing and the ship's rail?

A They were very close to the fence of the ship.

Q About two feet?

A I don't know how much.

Q You told us yesterday you didn't hit anything in falling into the water; is that correct?

THE INTERPRETER: You didn't feel anything?

Q You didn't hit anything down on the way into the water.

A Yes.

Q After you were in the water, did you do any swimming?

A I wasn't swimming, I was bobbing in and out.

Q And you were thrown a life ring; is that not correct?

A Yes.

Q And you caught hold of this life ring; is that

right?

A With one hand.

Q And were you then towed around the stern of the ship over to the pier?

A Yes.

Q And when you caught this life ring and when you were being towed around from the end of the ship to the pier, you were conscious in holding onto this ring, weren't you?

A I didn't know they were pulling me out. I was holding to that ring and I was in or out. Meaning loosing consciousness and coming back.

Q Didn't you climb a ladder to get out of the water onto the pier, Mr. Picinich?

A I don't know anything about that ladder. I know they pulled me out.

Q You didn't climb up?

A I felt very dizzy. I don't know whether I climbed or they pulled me. But I'm sure I felt they were pulling me.

Q Mr. Picinich, isn't the distance from the water or wasn't the distance from the water at pier B, Hoboken, to the pier about five or six feet?

A I don't know that.

Q You don't remember climbing a ladder to get out of the water or you don't know how you got out of the water; is that your answer?

A I don't know.

Q You don't know?

A I was in such pain I don't know what was happening.

Q After you got out of the water, didn't you walk into the pier shed to the timekeeper's office?

A No. They put me on the pallet. They stretched me out on the pallet.

Q You didn't do any walking at all from the time you got out of the water until you got to the timekeeper's office?

A They were helping me on both sides. I don't know whether I was walking or what.

Q But you were being helped on both sides?

A I think so. I'm not sure how it happened.

Q After you got to the timekeeper's office, you didn't get any medical treatment or first aid treatment there, did you?

A The only thing they did, they changed my wet clothes and they gave me some dry overalls.

Q But they didn't give you any medicines or bandages or anything of that sort, did they?

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A I don't remember anything.

Q And you went from the timekeeper's office to St. Mary's Hospital in Hoboken; is that right?

A Yes.

Q How did you get from the timekeeper's office to St. Mary's in Hoboken?

A With a car.

Q Was this car driven by a friend of yours?

A One of the longshoremen.

Q Do you know who the longshoreman was?

A I don't remember.

Q And after you got to St. Mary's you had X-rays taken and I think you told us yesterday that they gave you some pills; is that right?

A Yes.

Q And after you got these pills and the X-rays were taken they told you you could go home; is that correct?

A Yes.

Q And you did go home; is that right?

A Yes.

Q And how did you get home from St. Mary's Hospital?

A The same longshoreman took me with his car.

Q Now, after that, the day of your accident, when

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did you next get medical treatment of any kind?

A The second day I went to the doctor.

Q Not the next day but two days after your accident?

A The next day.

Q The very next day after your accident?

A Yes.

Q Where did you get this treatment?

A Dr. Zitani.

Q And did Dr. Zitani come to your house or did you go to Dr. Zitani's office?

A I went to his office.

Q And how did you get to his office?

A One man took me with his car.

Q I'm sorry?

A One man took me with his car.

Q And who took you with his car, could you tell us?

A I don't know his name.

Q And thereafter you saw Dr. Zitani about how many times a week?

A I don't remember how many times a week. Once or twice, I really don't remember.

Q On each of these occasions, were you driven to Dr. Zitani's office?

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A More often with a car. Once or twice I went by myself.

Q Your friend that drove you to Dr. Zintani's office, he only took you there twice,didn't he? The rest of the time you went on the bus?

A I forgot that.

Q Well, when you testified in this courthouse on November 20, 1973, do you remember being asked this question, page 46, line 21, do you remember being asked this question:

"Q Did this friend of yours drive you to the doctor each time?

"A No, only twice."

Do you remember being asked that question and giving that answer?

A I don't know. Maybe I did but you know when you ask me something after five minutes I usually forget.

Q Do you remember he asked this question:

"Q How did you get there on other times?

"A Bus."

Do you remember being asked that question and giving that answer?

A I don't remember.

Q Do you remember those questions and that answer?

A I don't remember.

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Q Well, do you remember at the time of this deposition that there was a Yugoslav interpreter present who served as interpreter during your deposition; do you remember that?

A I forgot all of that. I am not the same man as before.

Q Well, then, do you remember reading this transcript of this testimony, September 29th of this year, and signing it without changing anything?

MR. FRIEDMAN: Your Honor, there is a double question there. Signing, reading. I'm objecting on that ground.

MR. KAIN: I will split it up, your Honor.

Q Do you remember signing a transcript of this testimony with Mr. Heller on September 29, 1975?

MR. HELLER: We will concede, your Honor, that the plaintiff signed it.

Q And before you signed it, did you read it?

May I rephrase my question?

The deposition is in English.

Was it read to you before you signed it?

A I don't remember that. I don't know that.

Q Well, can you tell me, Mr. Picinich, when is the last time that you got medical treatment for the injuries which you sustained on July 12, 1971?

A I don't remember that.

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Q You haven't had any medical treatment, have you, Mr. Picinich, since you went back to work, I think you said yesterday, about ten months after this accident?

A I don't remember.

Q Well, Mr. Picinich, did you tell us yesterday that since this accident you have been afraid and depressed? Was that your testimony yesterday?

A Yes.

Q Now, you had an accident in June of 1968, didn't you, Mr. Picinich?

A It must be my hand was injured at that time.

Q Your left shoulder --

THE COURT: May I hear the question and answer?

(Question and answer read)

Q You remember you had such an accident involving your left shoulder and left arm? Do you remember that you had an accident on June 17, 1968, involving your left shoulder and left arm?

A Yes. That was around my elbow.

Q And were you afraid and depressed after that accident, Mr. Picinich?

A No.

Q Now, you also had an accident on April 16, 1974, involving your head and nose; isn't that so?

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A That was only my nose.

Q Were you depressed and afraid after that accident, Mr. Picinich?

A Yes.

Q And on May 19, 1974, you had an accident involving your right elbow, back and your right leg, did you not?

A Yes.

Q And were you depressed and afraid after that accident?

A Yes, I was.

MR. KAIN: Will your Honor excuse me for a moment?

THE COURT: Surely.

(Pause)

MR. KAIN: I have no further questions.

THE COURT: Mr. Leonard.

CROSS EXAMINATION

BY MR. LEONARD:

Q Mr. Picinich, you have spent some twelve years in this country, have you not?

A Yes.

Q You do speak some English, do you not?

A I understand a little bit.

Q You are a naturalized citizen of the United States, are you not?

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A Yes.

Q And when you became a naturalized citizen of the United States, you were given a test in your ability to speak, read and write the English language, were you not?

A That little bit they ask me I knew, that little bit what they ask me I knew.

Q And you convinced them that you were able to speak, read and write the English language before you were naturalized; is that not so?

A They asked me very little. I had some questions and answers to learn by heart.

Q As a matter of fact you were tested in English on United States history as part of the examination before your naturalization, were you not?

MR. HELLER: Objection. There is no showing what the examination was at the time and place when it was taken.

MR. LEONARD: I am asking this witness.

THE COURT: I'll overrule that.

A I answered them what I knew from that little booklet.

Q So the answer is yes, Mr. Picinich; is that not so?

A Whatever I learned then, I knew how to answer then

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but I forgot what I learned.

Q When you went to the hospital with a longshoreman you did not then know that longshoreman; is that not so?

A I know that man but I don't know his name.

Q When you got to St. Mary's Hospital they asked you what your name was, did they not?

A Yes.

Q You told them, did you not?

A That man told them.

Q They asked you what your home address was. Did that man tell them that, too?

A Yes.

Q They asked you what your wife's name was. Did the longshoreman tell them that, also?

A I don't remember them asking for my wife's name.

Q Is it your testimony, Mr. Picinich, that you gave personally no information to anyone at St. Mary's Hospital?

A By now I forgot.

Q Were you conscious then, Mr. Picinich?

A The pain was tremendous and I don't know where I was.

MR. LEONARD: Did the witness say I don't know or I didn't know?

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THE COURT: Let's have the answer read.

Ask the witness again.

A The pain was tremendous and I don't know what was going on with me.

Q Now, Mr. Picinich, when Mr. Heller asked you yesterday how many containers were on deck on the offshore side of number five hatch, you told him there were eight, did you not?

A Four and four, yes.

Q I believe you told Mr. Kain on cross examination that someone else had told you that; is that not so?

A I told him it was -- I told him again there was four groups with two in each.

Q Was it your personal recollection that there were eight containers on the offshore side of number five?

A Yes. When I first came on the ship I saw them, eight

Q Is it this witness' personal recollection that that was so? Emphasize personal, please.

A Yes, I saw them.

Q On November 20, 1973, page 20, line 8, were you asked these questions and did you give these answers --

THE COURT: You better let the interpreter tell that to the witness first.

(Pause)

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Q "Q Were there more than two containers on the offshore side at hatch number 5?

"A I think there were about three or four containers on the offshore side."

Were you asked that question and did you give that answer?

A I don't know that.

Q Has anyone since November 20, 1973, given you information as to the number of containers that were on the offshore side of number 5 hatch?

A I don't know. I don't know that.

Q Has your testimony to Mr. Heller and to Mr. Kain been given only on the basis of your recollection as opposed to what someone else may have told you?

MR. FRIEDMAN: Objection, your Honor. That is an impossible operation of the mind.

THE COURT: No, I'll overrule that objection.

MR. FRIEDMAN: May we approach the bench on that, your Honor.

THE COURT: No.

A Only what I can remember.

Q And was the testimony that you gave on the examination before trial on November 20, 1973, based only upon your recollection?

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A I think what I remember I told.

Q How far did the container on which you were standing at the time of your accident move inboard?

A I don't know. I found myself in the water.

Q Did you ever tell anyone that the container on which you were standing moved four to five feet inboard at the time of your accident?

A I don't remember that.

Q On November 20, 1973, page 38, line 15, were you asked this question and did you give this answer:

"Q And then the container that you were standing on started to move towards the dock, too?

"A Yes, moved towards the hatch bow four or five feet."

Were you asked that question and did you give that answer?

A I don't remember that.

MR. LEONARD: May I have a concession from counsel that question was asked and that answer was given?

THE COURT: You are entitled to read any part of the plaintiff's deposition. Unless they correct you we will assume it is an accurate reading.

MR. FRIEDMAN: Absolutely, your Honor.

MR. LEONARD: Thank you, your Honor.

Q Who is Mr. Nick Picinich?

A That is my son-in-law.

Q Does he speak Cerbo Croation, your language?

MR. HELLER: The language is Croation Primorsky.

THE COURT: Nick Picinich is your son-in-law or your son?

THE WITNESS: Son-in-law.

MR. LEONARD: What language are you using?

THE INTERPRETER: Croation with a dialect Primorsky. That is not pure Croation. That is not a literal language.

MR. LEONARD: Would you ask the witness whether Nick Picinich speaks that dialect?

A He speaks a little because he was a very small child when he first arrived here.

Q On the deposition did not Nick Picinich assist you in your understanding of the questions that were being asked?

A I don't remember that.

Q Where was the container which was hooked up to the ship's fall at the time when the container on which you were standing moved?

A It was just cleared the height of my container I was standing on.

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Q The hatch at number 5 was between you and the shore, was it not?

A Yes.

Q And between the inboard -- I'm sorry, between the inshore side of the hatch and the side of the vessel there was a space of about 20 feet, was there not?

THE INTERPRETER: Between the container?

Q Between the inshore side of the hatch and the inshore side of the ship there was an additional space of 20 feet, was there not?

MR. HELLER: I'm sorry, I don't understand the question.

MR. LEONARD: I don't think I can be much clearer than that.

THE COURT: In other words, you have the other side of the hatch. From that point to the other bulwark that is by the pier. That is what he is asking about.

A Yes, I think so.

Q And between the inshore bulwark of the ship and the pier there was a space where there was some water, was there not?

A Yes.

Q Did you ever tell anyone that at the time that your container moved, the container which was in the air

was halfway between the ship and the dock?

A I don't remember that.

Q On November 20, 1973, were you asked this question and did you give this answer --

THE COURT: Now, look. This is his deposition. You can read it. Apparently it doesn't help very much to ask him if he ever told somebody something. If you want to read his deposition, you can do it now. Why don't you just read it.

MR. LEONARD: All right, your Honor.

"Q The container that was being removed by the gang was completely out of its slot space; is that correct?

"A Yes, it was halfway towards the dock, movin halfway toward the dock."

Q Now, Mr. Picinich, when you first went up on top of a container, you told Mr. Heller and Mr. Kain that you used a ladder; is that not so?

A Yes.

Q Where did you place the ladder so as to get up onto that first container?

A I don't know where they put that ladder. There were those two longshoremen who were on the deck, their duty is to move or remove those ladders.

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Q When you were on the ladder, where was the ladder?

A That was against that container what was being removed later on.

Q And where was the base of the ladder placed when you were on it?

A Now I really don't remember. Was that based on the deck or on that first container down, the bottom one?

Q After you and your partner hooked up the first container, did you go down the ladder then?

A No.

MR. HELLER: Your Honor, wasn't there some kind of agreement that the third party defendant wouldn't go over the same grounds as the defendant?

THE COURT: I don't think he is. I will allow this.

A No.

Q The answer is what?

A The answer is no.

Q After the first container had been hooked up to the ship's fall did anyone give a signal to the winchman?

A I don't know that.

Q Do you know whether or not you gave a signal to the winchman to lift that container?

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A No.

Q Did your partner --

A No, no.

Q Did your partner give a signal to the winchman to lift?

A I don't know. I didn't see him.

Q When did the wedding occur which you missed?

Would you give me the date of the wedding at at which you were not present?

A I don't remember the date.

Q Would you tell me the year of the wedding which you missed?

A It was maybe a month ago now. There were more weddings I didn't attend.

Q When was the christening that you didn't make, Mr. Picinich?

A That was after the accident.

Q When?

A Two, three years ago.

Q On the day of your accident was it raining?

A I don't remember.

Q At the time of your accident was the ship rocking?

A I don't know that.

Q At the time of your accident was the water calm or

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rough, do you know?

A I think when I looked down from those containers it seems to me it was calm.

MR. LEONARD. No further questions, your Honor.

MR. HELLER: No redirect, your Honor.

THE COURT: All right, Mr. Picinich, you may step down.

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AFTERNOON SESSION

J O H N M O R I C H, called as a witness on behalf of the Plaintiff, after being duly sworn, testified through the interpreter as follows:

THE COURT: Ms. Rakijas, you are going to translate again?

THE INTERPRETER: Yes.

THE COURT: You have talked to this witness?

THE INTERPRETER: Yes.

THE COURT: And he speaks the same language?

THE INTERPRETER: The same.

DIRECT EXAMINATION

BY MR. HELLER:

MR. KAIN: Before we commence, may we inquire whether this witness speaks English at all or whether he has any proficiency in English?

THE COURT: Mr. Morich, do you speak English at all?

THE WITNESS: I understand but I am not able to speak.

THE COURT: Well, we have had the witness sworn but it is about an hour twenty minutes since we came back from lunch. I think we will take our break now.

Tell the witness we will take a short recess.

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(Recess)

(In open court - jury present)

J O H N M O R I C H, resumed.

DIRECT EXAMINATION

BY MR. HELLER:

Q Mr. Morich, where and when were you born?

A In Susak, 31 July, 1920.

Q And that place you named, does that have an Italian name, too?

A The Italian name is Sansego.

Q Now it is Yugoslavia?

A Yes, Yugoslavia.

Q What is your occupation now?

A Longshoreman.

Q And what kind of job do you do in the longshore gang? Are you the gang boss, driver or holdman?

A I'm a holdman.

Q When did you come to the United States?

A '63, in '63.

Q Now, in addition to Croation, which you are speaking now, do you speak another language besides Croation?

A Croation and Italian.

Q Which one do you speak better, by the way?

A The same, about the same, Croation and Italian.

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Q Now, when you came to the United States, did you go to school in the United States?

A No.

Q And where do you live? What town do you live?

A Jersey City.

Q And do you know any other people with the same name as you?

A Yes.

Q Now, are you a member of a regular longshore gang?

A Yes.

Q Back in July, 1971, were you a member of a regular gang, July 12th?

A No.

Q Did you go to work July 12, '71, on pier B?

A Yes.

Q By the way, you came here today pursuant to subpoena, didn't you?

A Yes.

Q Back on July 12, '71, you weren't a member of a regular gang. Did you know Mr. Picinich, Anton Picinich?

A No.

Q Now, on July 12, '71, were you assigned to work in Santoro's gang?

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MR. KAIN: May I ask a direction from the Court to stop leading the witness?

THE COURT: At this point I will overrule the objection.

THE INTERPRETER: May I hear the question?

Q Were you assigned to work in Santoro's gang on pier B?

A The stevedore company assigned me to that ship.

Q Did you use the word "bi-state"?

A Bi-state.

THE COURT: I don't know where we are because there has been some confusion.

MR. HELLER: Can I clear it up, your Honor?

THE COURT: Yes.

Q When you say "bi-state," you mean the New York, New Jersey hiring hall and it was there you obtained the job?

A In Hoboken.

THE COURT: The thing that confused me, did he say he had been assigned to Santoro's gang or not?

MR. HELLER: Yes, he did, from the bi-state. When he says bi-state he means the New York-New Jersey hiring --

THE COURT: Why don't I just ask.

Mr. Morich, I didn't understand. Were you

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assigned to Santoro's gang?

THE WITNESS: Yes, day to day.

Q And did you receive the job from the bi-state hiring hall in Hoboken?

A Stevedore from the pier.

Q And when you went to the pier you went to Mr. Santoro's gang; is that right?

A Yes.

Q Now, what ship was at the dock, pier B?

A Viking.

Q Is that the Concordia Viking?

A Concordia Viking.

Q And which side of the pier was it on? Was it on the south side of the pier or the side closest to the bridge, the north side? Tell us which side.

A On the south.

Q When you came to the pier, what time was it approximately?

A Five minutes after what?

Q What job did Mr. Santoro assign to you?

A We had to discharge the containers.

Q And where were these containers, near what hatch on the Concordia Viking?

A They were on the left side, on the south side.

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Q Is that the side of the ship closest to the water as distinguished to the side that is moored against the dock?

A Near the water.

Q Now, can you tell us, when you went on board this ship on the left side of the pier how many containers were there standing on the left side of the ship; that is, how many containers were there on the left side where you were assigned to work?

A They were eight.

Q Were they empty or full?

A Empty.

Q Now, can you tell us how they were arranged or stacked?

A They were four by four and they were two on each other.

Q And were they spread apart or grouped altogether in an oblong?

A They were close to each other.

Q And can you give us the dimensions of the approximate group altogether?

A 20 plus 20, that was 40 feet. I don't know the right size. They were around 40 feet because each container is 20 feet long.

Q And how wide were they between the hatch and the bulwark?

THE INTERPRETER: What?

Q How much space did they occupy between the hatch coaming and the bulwark?

A Three to four feet.

Q Three to four feet, is that the width of all the containers between the hatch and the bulwark?

A They were three, four feet away from one side and three or four feet away from the other side.

Q You said they were stacked two containers high; is that correct?

A Yes.

Q Now, were you assigned in any way to climb on the containers or did you do your work on the main deck?

A Two went up the container but two of us stayed down.

Q When you say down, you mean on the main deck?

A Yes, on the deck.

Q Now, when you saw those containers, did you notice anything unusual about them?

A I saw those containers stacked on each other.

Q Was there anything on these containers that you usually -- strike that.

Was anything missing from these containers that you usually see?

MR. LEONARD: I object, your Honor. We have had a question and an answer and I think counsel is trying to vary the import of the answer and clearly leading the witness.

THE COURT: Well, I don't think so. It is a little bit leading in a way. I don't know any other form to ask it in. I don't think the first question about something unusual is the end of the line.

Proceed.

Get in your words.

MR. HELLER: May I have the question back?

A They had to be tied, they had to be tied up together but they were not.

Q Well, tell us why they weren't tightened? Do you mean tight or tied? I don't understand.

A The lashing, the wires around, they were not on those containers.

Q How about any stacking device?

MR. LEONARD: Your Honor, this is clearly leading. Mr. Heller might as well testify.

THE COURT: Mr. Heller, if you want to ask whether or not a specific thing was on there, you ask it. Ask him

whether or not it was there.

Q Can you tell us whether or not there were any shoes on this container?

A No.

Q Were there or weren't there shoes on the container?

THE COURT: He says there weren't.

Q Now, you said two men went up on the container. Which container did they climb up on?

A That one close to the aft, the aft container.

Q And how high did they have to climb to get on top of the container?

A They went up on the ladder.

Q How high, how many feet?

A Each container is around six feet high. That means twice as much. That is approximate. Those containers were eight feet high each.

Q And how many containers high did he have to climb to reach the top?

A Two, two.

Q Now, did you have the occasion to observe these men while they worked on top of the container?

A Yes.

Q And was one of the men Anton Picinich?

A Yes, Anton Picinich.

Q What did he and the other man do on the inshore container close to the hatch?

A That was the one who went up first.

Q What did they do when they got on top of the container?

A They tried to attach those hooks on the container.

Q And did they attach the hooks?

A Yes.

Q Now, after they attached the hooks, what did they do? More specifically, what did Mr. Picinich, Anton Picinich do?

A They stepped on the next container.

Q Is that the one offshore?

A Yes.

Q Now, did the other man stay with Mr. Picinich or did he leave? What did he do?

A He stepped on the next container, too.

Q Then what did the two men do, that is, Mr. Picinich and the other man?

A When that container, they were on before was lifted, then that container that was Mr. Picinich on slid in its space and Mr. Picinich fell into the water.

Q What happened to him after he fell into the water? Did you see him or tell us? Did you see what happened to Mr.

Picnich?

A Yes, I saw him fall into the water. And I saw the container slid into that empty space.

Q Now, how far were you from the container when you saw this?

A I was five to six feet away. A long time has past. I don't know how many feet I was away but I was about that distance away.

Q Were there any shoes locking the bottom containers to the deck of the ship?

A No.

MR. HELLER: No further questions.

THE COURT: Mr. Kain.

CROSS EXAMINATION

EY MR. KAIN:

Q Mr. Morich, what is your waterfront number?

A 71967.

Q And what is your Social Security number?

A I don't know that. I have to see.

Q Will you let the interpreter have it, please.

A That is 112-36-7510.

Q Have you, Mr. Morich, been represented at any time by either Mr. Heller or Mr. Friedman or anybody in their offices?

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A Yes, I saw him Friday.

Q Is Mr. Heller the one you are referring to?

MR. HELLER: I don't think he understood the question. He asked him was he ever represented by me? I will say for the record I never represented Mr. Morich.

MR. KAIN: If your Honor please --

THE COURT: Please sit down, Mr. Heller.

Go ahead, Mr. Kain.

(Question read)

A Yes.

Q Has Mr. Heller ever been your lawyer in a case of your own?

A Never. I was never in the lawyer's office at all.

Q Do you know Mr. Anton Picinich, the plaintiff in this case?

MR. HELLER: Your Honor, it is ambiguous as to time. That is my objection.

THE COURT: It is not. Objection overruled.

A Naturally I see him on the bi-state, I see him on the work.

Q Do you sometimes see him on the piers?

A When we work?

Q Yes, when you work.

A Yes. Not every day. Because we work sometimes in Brooklyn, sometimes in Hoboken.

Q And did you work with Mr. Picinich before July 12, 1971?

A We didn't work together but we worked on pier C.

Q And you belong to the same union; is that so?

A I have Local 2. I am not sure what he has. I'm not sure.

Q You never saw Mr. Picinich in the unionhall?

THE INTERPRETER: I didn't hear that.

Q You never saw Mr. Picinich in the union hall or local's union hall?

A I see him on the bi-state, I see him on the work.

Q Now, how long after this accident of July 12, 1971, did you see Mr. Picinich?

A I didn't see him at home. I saw him only when he start to work again on the bi-state.

Q And how long after this accident of July 12, 1971, did you talk to anybody about the accident?

A No, I didn't talk to anybody. Only when the lawyer ask me what happened I told him what happened.

Q And that was last Friday?

A Yes.

Q Is it your testimony that you talked to nobody

about this accident on July 12, 1971, until last Friday?

A Yes. When the lawyer ask me how did it happen and did I see what happened.

Q How did you happen to go to Mr. Heller's office? Did somebody ask you to come in?

MR. HELLER: Objection. He never testified he went to my office. He is paraphrasing testimony or what he thinks is testimony which is not on the record.

THE COURT: It is not of any consequence. He saidhe saw you.

MR. HELLER: I served him a subpoena in his home. He never testified he went to my office.

MR. KAIN: I will rephrase the question.

THE COURT: It is of no consequence.

Q Where did you see Mr. Heller last Friday?

A He came to my home, gave me that paper. And he ask me then what happened and he ask me to come to his office.

Q To come to his office? Did he give you a subpoena at the time he came to your home?

A Yes.

Q Did he give you money at the time he gave you a subpoena?

A He gave me $10 for the fare to come to New York.

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Q That is what he gave you, $10 for a subpoena fee?

A Yes.

Q I think you told Mr. Heller that you came to the United States in 1963; is that correct?

A Yes.

Q Have you worked as a longshoreman since you came to the United States exclusively?

A I had two jobs at that time in '63. I worked in a restaurant nighttime and as a longshoreman daytime.

Q And how long have you worked as a longshoreman, since when?

A I don't remember the date when I started to work but I know it was in '63.

Q 1963 you worked steadily as a longshoreman?

A (In English) No steadily.

Q I see.

A I didn't work steadily.

Q What type of work did you do in Yugoslavia?

A I was a seaman.

Q Did you sail aboard ship as a seaman?

A Yes.

Q And did you sail in the deck department as a seaman?

A No, I was the motorman. They were small boats

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that were four wagons, which is the size.

Q You sailed in the engine room; is that correct?

A Yes, in engine room.

Q On July 12, 1971, the day of this accident, were you notified by the dispatcher at the hiring hall to report to pier B at eight o'clock?

A Yes.

Q And that was at eight o'clock that he sent you down to pier B.

A Yes.

Q What time did you get down to pier B?

A That was immediately after. That was from bi-state I walked to --

Q You walked down from the hiring hall to the pier?

A Yes. It is very close.

Q And how long did that take you approximately?

A Not even five minutes.

Q When you got to pier B, did you check in with the stevedore, the timekeeper?

A Yes, I have to report to them to have them assign where to go.

Q And at that time they assigned you to number five hatch on the Concordia Viking; is that correct?

A Yes, number five. With Mike Santoro.

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Q When you got on board the ship, did you report to Mike Santoro?

A Oh, yes.

Q And what did he tell you?

A When I ask him where to go, he told me to go on that side, south side and to do that discharging.

Q Now, when you got to number five, was the hatch closed?

A Yes, closed.

Q Were there containers on deck next to the pier at number five hatch?

A No, they were not toward the pier. They were on the south side.

Q Well, when you went to sea, Mr. Morich, did you become familiar with the terms port and starboard?

A No.

MR. LEONARD: Your Honor, I am afraid that the difficulty in translation is not with the witness but the interpreter who apparently does not know the Croation word for port and starboard. It doesn't do to ask the witness if he knows port or starboard unless she knows it in Croation.

Does this interpreter know what the Croation terms are for port and starboard?

THE INTERPRETER: I have to admit I haven't heard

those terms.

Q When you came on that ship for the first time that morning and went to number five hatch, were there containers on deck at number five hatch on the side of the deck nearest to the pier, the inshore side of the ship?

A I don't remember. If I tell you I would lie. But he told me to go on the other, on the south side.

Q Well, Mr. Morich, you came on board this ship from the inshore side, the pier side, did you not?

A Yes.

Q And you came up a gangway about midships at the deck house of the ship, did you not?

A Yes.

Q Now, how did you go back to number five hatch?

A I went along the left side toward the stern.

Q You went along the side nearest to the pier?

A No. That was close to the pier on the left side.

Q Mr. Morich, when you say the left side, do you mean the side furtherest away from the pier or the side next to the pier?

A They were next to the pier, next to those containers, off those containers.

Q You came down along the side next to the pier, is that right, and going aft to number five hatch?

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A Yes.

Q And in doing that didn't you pass containers on deck at number four hatch?

A Yes.

Q And when you got to number five hatch didn't you have to cross over to the offshore side, the side furtherest away from the pier?

A Then I went alongside of those containers.

Q My question is when you got to number five did you notice any containers, these 20 foot by eight foot by eight foot containers on the side of the deck at number five hatch nearest the pier?

A I don't remember on that side but I remember those on the other side.

Q You only remember that there were containers on the side offshore of the one furtherest away from the pier; is that correct?

A Yes. The left side on the south side.

Q Before you worked aboard the Concordia Viking on July 12, 1971, had you worked on other dry cargo ships like the Concordia Viking?

A Oh, yes.

Q And had you on occasions when you worked on ships of this type loaded or discharged containers from the deck?

A Yes.

Q And isn't it true, Mr. Morich, that dry cargo ships have no fittings for stacking plates or shoes on the decks?

A Most of them don't have them.

Q Have you ever worked on a container ship?

A Not on those container ships. I didn't work on container ships but I worked on export ship.

Q Have you worked aboard any export container ships?

A Yes. That was on pier C, we have the gang there.

Q Those were ships that carried just containers; is that correct?

A No. They are mostly containers but not only containers.

Q They carried some cargo and some containers?

A Yes, loose and containers.

Q And you had never worked on a ship that carried just containers; is that right?

A I worked only for one day on that kind of ship but I was on the dock.

Q When you got back to number five hatch on July 12, 1971, were there three other men already there or did all of you come back at the same time?

A Some of them were me, some of them came after.

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Q Now, when you came back you came by yourself; is that right?

A Yes.

Q When you got back there were there any lashings secured on any of these containers?

A I don't know who took them away but they were not.

Q There weren't any turn buckles affixed to these lashings at that time, were there?

MR. HELLER: Your Honor, may I object?

THE COURT: Just a moment.

Don't translate yet, there is an objection.

MR. HELLER: What is the import or purpose of the line of questioning, your Honor? He has gone over it once, I think, today, turn buckles on containers?

THE COURT: I won't sustain that. I was a little confused by the question. I thought he said there were no lashings and then you asked him were there any turn buckles on the lashings, so I got a little confused.

MR. KAIN: I will rephrase it, if your Honor please.

Q Do you know what turn buckles are, Mr. Morich?

A Yes, I do. You tie them together. They were off when we came.

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Q When you got back to number five hatch on the morning of July 12, 1971, were there any turn buckles connected to any of the lashing wires in the area?

A Somebody must have took them off. I didn't see them.

Q They weren't there when you got there; right?

A I don't know who did it but I didn't.

Q Were there any lashing wires anywhere in the area?

A On one side they were on the deck. On the other side they were hanging. They were not tight. They were loose.

THE COURT: Can I hear the question and answer?

(Question and answer read)

Q When you say they were on the deck, Mr. Morich, do you mean they were pulled down physically and put on the deck; is that what you mean?

A Yes. We stepped over them.

Q When you got back there, did you get any instructions as to what you were to do?

MR. HELLER: Objection, your Honor. He answered that question before when he testified, in response to Mr. Kain's question, that Mr. Santoro told him to go over --

THE COURT: That is just a general question. I

assume this is asking for more specific instructions; right?

MR. KAIN: I want to know when he got back there physically was he given any further instructions of what to do.

THE COURT: You ask that question. That is a little bit more precise.

Q When you got back to number five hatch that morning, Mr. Morich, were you given any further instructions as to what you were to do at the hatch?

A I knew only when we finish with containers we have to go down to the hold.

Q Well, what, if anything, did you do from the time you got back to number five hatch that morning to the time of Mr. Picinich's accident?

A I was watching those two men attach those hooks on that container. Then I noticed that that one container slid and a man fell into the water.

Q My question is, Mr. Morich, did you, yourself, do anything from the time you got back to number five hatch and the time of Mr. Picnich's accident?

A Nothing. Those two were hooking or attaching those hooks up there and two of us were watching them.

Q Did you watch them as they attached the hooks?

A Yes, I can see.

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Q Could you tell me how they did it?

A They attach first one hook and then attach the other hook and then the second man did the same thing.

Q With the hooks attached by these two men into the side of the corner castings on these containers?

A No, from the top.

C From the top; is that correct, sir?

THE COURT: He said from the top.

A Yes.

THE COURT: Let's go on.

C Were you in court yesterday?

A Yes.

Q Now, you said to Mr. Heller just a few minutes ago that these were empty containers; is that correct?

A Yes, empty.

Q What indicated to you that they were empty?

A If they were not empty they couldn't be lifted, they couldn't be raised by those winches.

Q Were the containers raised by booms?

A Yes, winch and boom.

Q And how many booms were used to raise the containers?

A One boom.

Q One boom. Which boom was that?

A That one, up and down.

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Q And how about, where was the cargo fall secured on the pier?

THE INTERPRETER: I'm sorry, I didn't hear?

Q Where was the cargo fall secured on the pier?

MR. HELLER: Your Honor, he didn't say the cargo fall was secured anywhere.

THE COURT. I'll overrule that objection.

MR. HELLER: He is paraphrasing something that wasn't said.

MR. KAIN: I will rephrase it.

Q Was one of the cargo falls secured on the pier?

A Yes. That wasn't a boom there. Only wire was attached there and it was moved by the winch and was pulling the container on the other side.

Q Is that a house fall?

A Burton, that is the one that pulls toward the pier.

Q While you were in the courthouse yesterday did anybody discuss with you how these booms were rigged?

A No, nobody talked to me yesterday. But I work with those booms for ten years now. More than ten years now.

Q At which end of the hatch were the booms, can you tell me?

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A On the left side, that one what was up and down.

Q Were they at the back end of the hatch, at the front end of the hatch or at both ends of the hatch?

A It was fixed just like this and it takes the container just like that.

Q No. My question is if you recall, Mr. Morich, were there cargo booms at both ends of number five hatch or just at the forward end or just at the after end?

A In the middle of the hatch.

Q In the middle of the hatch?

Let me rephrase the question.

A It was fixed to --

Q I'm not asking you where the head of the boom was. Not the top end but where was the bottom end of the boom.

A That was on the left side. On the side where the containers were.

Q Was it at the forward end of the hatch, the back end of the hatch or were there booms at both ends of the hatch?

A That boom was fixed to be right in the middle of that hatch.

Q Where was the bottom of the boom faced that you are talking about?

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A You can move it a little bit forward. I don't know for sure how was it fixed.

Q Well, let me rephrase the question. How many booms were there, ship's cargo booms at the number five hatch?

THE COURT: Really, we are not getting anywhere. I think you have asked these questions. I don't think you have gotten the information but I don't think we can just keep on. I think that is where it has to stand and you will have to get the information from your own people. I assume they have photographs. But it is perfectly apparent to me, and to the jury I'm sure, that this witness isn't giving you the answers to these questions. Whatever reason that is, the jury can draw their conclusions. Now let's go to something else.

Q When you got back to number five, was there dunnage underneath the bottom containers on the offshore side?

MR. HELLER: At what time, your Honor? I am objecting to the question as ambiguous.

THE COURT: What time could it possibly be? July 12, 1971, at 8:05 in the morning.

A Yes. When they took that container up, when it was raised we saw the dunnage underneath.

Q That is the one that was raised, but I am talking

about the ones that were on deck, the bottom ones.

A That I don't remember.

Q But you do remember that the container that was raised had dunnage underneath it; is that correct?

THE COURT: He said that. Now, look, Mr. Kain, we have a witness. I think we ought to finish him today. I am sure you can finish him. I doubt if there is very much more and let's get him over with.

MR. KAIN: All right, your Honor.

Q At the time of Mr. Picinich's accident, were you watching Mr. Picinich?

A Yes. I saw the container sliding and him falling into the water.

Q At the time you were watching him and his accident occurred, what was Mr. Picinich doing?

A He went up the containers and he attached those hooks on the containers.

THE COURT: Look, I want you to listen very carefully to Mr. Kain's question.

I want you to translate this.

THE INTERPRETER: I did, your Honor.

THE COURT: I want you to translate what I just said.

THE INTERPRETER: I'm sorry, I thought you were

talking to me.

THE COURT: No.

THE COURT: And if you do that you can finish this afternoon and get back home and to work, and so forth.

Now you rephrase your question and be just as precise as you can, Mr. Kain.

Q At the exact time of Mr. Picinich's accident, what, if anything, did you see him doing?

A I saw him attach those hooks. Then I saw him step on the next container. And the moment the container was raised and I saw that container Mr. Picinich was standing on slid in that empty space and saw him falling into water.

Q At the time he actually fell, was he doing anything or was he just standing on the next container?

A I saw him fall.

Q You are not answering my question. At the time you saw him fall, was he doing anything at all or was he just standing on the next container to the one being raised?

MR. FRIEDMAN: May I suggest that Mr. Kain say just before the fall and maybe we will get to the point.

THE COURT: I think that is a good suggestion.

Mr. Morich, what Mr. Kain is asking you is this: just right before he fell, was he standing on the container, was he pulling a wire? What was he doing?

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THE WITNESS: He was standing on that container.

Q The container on which he was standing you say slid inboard toward the hatch; is that correct?

A Yes.

Q And about how far did it slide in towards the hatch?

A Around five to six feet.

Q Five to six feet.

Now, before this container slid in toward the hatch, the one on which Mr. Picinich was standing, did the container which was being hoisted from inboard of that container, was that raised all the wayup above the level of the container that moved in towards the hatch?

A Yes, that container was up when this one slid.

Q If I understand you correctly, it was up above the top of the sixteen feet on which Mr. Picinich was standing; is that correct?

A Yes.

Q Do you know what the term "high lining" means, Mr. Morich?

May I ask for a yes or no answer to that, your Honor, whether he knows what the term means.

A No, I don't know.

THE COURT: Ms. Raikjas, are you giving him the

term "high lining" in English or do you know a Croation word for that?

THE INTERPRETER: I use both because he is familiar more with English expression than with Yugoslavian.

THE COURT: Anyway, they both were used and the answer is no.

Q When Mr. Picinich fell over the side, did he fall head first?

A It looked like he was propelled to that water.

Q My question is did he fall head first over the side?

A I really don't know how.

Q Do you, Mr. Morich, have any personal knowledge as to what caused this container upon which Mr. Picinich was standing to move five or six feet in towards the hatch?

A I really don't know. I really don't know how. I saw it slide but I don't know how.

Q Did you see Mr. Picinich hit the water?

A Later on when he came up, when he bobbed up.

Q Did somebody throw Mr. Picinich a life ring with a piece of line attached to it?

A Yes. I saw him hanging on that.

Q Do you know who threw the line and the life ring to him?

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A I really don't.

Q Did you see Mr. Picinich towed around the stern of the ship and over to the side of the pier?

A I saw him just partly. I didn't see how he was pulled later on.

Q But you did see him in the water holding on to a life ring; is that correct?

A Yes. I don't know how he was holding on but I saw him there with that ring.

Q Did you see him climb from the water onto the pier?

A No.

Q Did you see him walk from the pier to the timekeeper's office?

MR. HELLER: Objection. There is no testimony the plaintiff walked from the pier to the timekeeper's office.

MR. KAIN: I am asking if he saw him, your Honor, please.

THE COURT: No assumption in the question. It is just a question of whether or not.

A No, no. I was on the ship.

Q You didn't see Mr. Picinich any more that day?

A No.

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Q And you didn't see him again until he returned to work after his accident; is that right?

A Yes, I saw him on the bi-state.

Q When did you first find out that Mr. Picinich had a lawsuit?

A When the lawyer asked me to come over here, then I heard.

Q That was last Friday, was it?

A Yes.

MR. HELLER: Your Honor, we went over this ground again and again and again.

THE COURT: Yes. I think Mr. Kain is finished.

MR. KAIN: I have one more question, if your Honor please.

Q Do you know who Mr. Picinich's partner was on the day of this accident?

A We were eight of us. I really don't know which one was up there.

MR. KAIN: That is all.

THE COURT: Anything, Mr. Leonard?

MR. LEONARD: Very few questions.

CROSS EXAMINATION

BY MR. LEONARD:

Q After the container slid, did it come to rest

partly on the inshore container and partly on the offshore container?

A Yes, on the other.

Q Did you go on that container after Mr. Picinich fell in the water?

A Oh, no, I didn't want to go there.

Q Did anyone go on top of that container after Mr. Picinich fell in the water?

A There were two of them.

THE INTERPRETER: Off the record. I'm afraid he didn't understand the question. May I repeat once more?

MR. LEONARD: Please do.

A Yes, they went up.

Q Two longshoremen?

A Two.

Q Did they hook the hooks from the cargo wire into the sides of the container?

A Yes, they did.

Q And did the winch then lift up the container from where it was?

A Yes, they took it on the pier.

Q Onto the pier?

A Yes.

Q So that that container from which Mr. Picinich

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fell went from its position of rest onto the pier directly; is that so?

A Yes, they attached those hooks and they took it onto the pier.

MR. LEONARD: No further questions.

THE COURT: Mr. Heller, have you any?

MR. HELLER: No further questions.

THE COURT: You are excused, Mr. Morich.

(Witness excused)

THE COURT: We are adjourned until ten o'clock tomorrow and don't discuss the case tonight in any way.

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rd/lf/155

ANTON PICINICH

vs.

CHRISTIAN HAALAND & BOISE-GRIFFIN
STEAMSHIP COMPANY, INC.

---------- 71Civ. 5357

SKIBS A/S SAMUEL BAKKE

vs.

JOHN W. MC GRATH CORPORATION

October 8, 1975

W I L L I A M C H E S T E R A S H, called as a witness on behalf of the Plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HELLER:

Q Sir, what is your occupation?

A I'm a marine consultant.

Q Do you hold any license?

A Yes, I do.

Q What is the scope of the license you hold?

A I hold the license as master, any ocean, any tonnage under the American flag.

Q And does that allow you to command any ship, any American ship, any tonnage?

A Yes. Merchant vessel.

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Q Now, can you give us a brief resume of your maritime background, experience and training in the maritime industry?

A I started going to sea in 1927 as an ordinary seaman. After one year experience I was examined and rated an ablebodied seaman as to my knowledge of the duties of seamanship by the Bureau of Marine Inspection and Navigation, which has since been absorbed into the Coast Guard.

I continued sailing for the next four and a half years as an ablebodied seaman, and in 1932 I sat for my first license as a third mate, any ocean, any tonnage, any ship.

After experience as a third mate, in 1935 I got my license as a second mate.

I continued sailing as a third and second mate in 1937, and at that time I was examined and received my license as a chief mate, any ocean, any tonnage.

I continued sailing. On May 1, 1939, I received my first issue of license of master, any tonnage, any ocean.

This was all while I was sailing with the State Steamship Company of Portland, or gone on their Transpacific passenger vessels and their intercoastal freight vessels.

In 1940 I was forced ashore by the neutrality law because the company had to reduce their fleet from 33 ships

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to eight ships and I didn't have even enough seniority for a third mate's job. I got a position in New York with the board of education, the maritime trade department in their Metropolitan Vocational High School as an instructor, deck.

I was later promoted to senior teacher in the ship building trade school which was an annex of the Key Vocational High School in Staten Island, where we had a shipyard with three floating dry docks and nineteen shops and 1100 adults and adolescent students in all the shipyard trades.

When war was declared I requested a release to go back to sea, which was granted, and I made one voyage for my old company. At the termination of that voyage I was requested by the war shipping administration to become an instructor in seamanship and navigation at the Merchant Marine Academy at Kings Point. I was subsequently appointed to executive officer, two of the largest candidate schools for merchant marine officers, the one at Fort London, Connecticut, and the one at Alameda, California.

A period of illness ensued, released from active duty and came to shore. I was able to work for the American Foreign Steamship Corporation in New York as a port captain in charge of deck operations in a fleet that expanded from nine ships to 23 ships.

Before the end of the war I was able to return to

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active sea duty and command an oceangoing vessel and sailed in convoy in both the Atlantic and Pacific.

Subsequent to that I worked ashore as an independent marine surveyor, and then I went back to sea in '50 after four years service as a part-time marine surveyor and an official of the National Organization of Masters, Mates and Pilots and Officers Association.

From 1950 to 1958 continuously I sailed as master for the Clifton Steamship Corporation and one of their subsidiary corporations. In 1958 I came ashore here in New York for three years, working as a port relief officer and served in over a hundred different ships in relieving the regular ship's officers to go home while the vessel was in port. And I was in charge of the ship most of the time that I was aboard.

Cargo operations, shifting, whatever it was. Then in 1961 I returned to sea with the Waterman Steamship Company for one year in their North European and their Far East trade as a second officer, working under the supervision of the master and the chief officer.

In 1962 I went with Marine Transport Lines of New York as a chief officer and was promoted to relief captain and then in 1963, early '64, regular captain in command of their vessels all in the ocean bulk trade. Tramping

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all over the world and coastwise with nothing but bulk cargoes. During that period I also commanded a U.S.N.S. coastal crusader, a missile tracking vessel, for the space program for almost a year.

My last command was in 1968, which I relinquished in July when the vessel was due to be scrapped out in Taiwan. I returned home with the crew and went off the payroll in September of the same year with my accrued vacation and since then I have been working ashore continuously as a marine surveyor, as a marine consultant. Mostly as a marine consultant and mostly for plaintiff's attorneys, occasionally for defendants.

My work as a marine consultant occasionally required my presence in court to testify, as I am here today.

I am doing that work almost continuously since 1968, September. I am an affiliate of the Society of Naval Architects and Marine Engineers since 1944. I am a member of the Institute of Navigation since 1948.

Q How old are you now, Captain?

A I'll be 71 in December, I hope.

Q Captain, in your teaching experience as well as your working ship officer's experience and master of the United States Merchant Marine, have you had experience

carrying cargo on a ship's deck, more particularly large units such as tractors, trucks or containers?

A A great deal of such experience, particularly during the war when we had deck loads on practically every ship going to any theater of war and I was responsible for the loading of many of them. And most of the East Coast and Gulf ports. Also in the ships I sailed in, intercoastal, west coast to east coat, we were never without a deck load. Also been a seaman as far back as 1931 carrying a hugh deck load of machinery from New York to Leningrad, to help them build their power plants.

Q Captain, are there any standard textbooks used as a reference by ship's officers containing instructions on stowing and securing of large units of deck cargo such as containers, trucks, tractors?

A Oh, yes. Practically any book on cargo installation, cargo stowage has references to deck loads and their proper stowage and securing. Principlely one of the best is Marine Cargo Operations by Captain Saurbier, who is an outstanding and internationally known representative. That textbook is used at the Merchant Marine Academy. Captain Thomas' book on stowage, a British master, is an outstanding publication. Captain Ford, his Cargo Operations. There is a Frenchman, Ga Roche. There must be at least a dozen well-

written textbooks, all of which have chapters and such about deck cargoes and all of which are an important part of the education of any deck officer.

Q Why are ship's officers required to study the subject of deck cargo and cargo stowage?

A Well, first of all, in order to get their license they are examined very extensively by their governing bodies, classification groups, particularly American officers and British officers are examined by the board of trade and American officers by the Coast Guard on cargo handling and cargo stowage because it is their responsibility, from the time the cargo gets on the end of the hook from the dock into the ship, all the time it is in the ship until it goes off the ship onto the dock.

MR. KAIN: If your Honor please, I object to the captain's testimony with respect to the ship's officers' responsibilities insofar as they are binding in this case or have reference in this case on the basis I stated to your Honor before, that there is a stevedoring contract between this shipowner and the contract stevedore that specifically sets forth the requirements and who is to be responsible for what.

THE COURT: That is a jury question.

Incidentally, I think I will just rule, and I

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don't want to interrupt the flow of this, Mr. Heller, but I was looking at that question. I am going to overrule your objection. I am talking about the deposition of the master and the question, page 53 -- and excuse me, Captain Ash. I will take care of this now before I forget it.

THE WITNESS: All right, your Honor.

THE COURT: I think the question on line eight, "Who was in charge of safety, by the way, on this ship?

"A Chief mate.

"Q Chief officer?

"A Chief officer.

"Q It is his job to examine deck cargo and other cargo to see that it is safe for seamen?

"A Yes.

"Q Safe for longshoremen, also?"

You objected to that question; right, Mr. Kain?

MR. KAIN: Yes, your Honor.

THE COURT: I think the captain of the ship ought to be permitted to testify on that. There is nothing to bar you from introducing other evidence or introducing a contract, but that is an admissible piece of evidence, what the captain of the ship says on that point.

MR. KAIN: Will your Honor then read the captain's of the ship answer to it, as long as your Honor is overruling

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my objection?

THE COURT: Certainly.

Just to save time, the plaintiffs were proposing to read a question and answer and I reserved decision. The question was:

"Q Safe for longshoremen, also?

"A Generally safe, yes."

The word "conduct." I don't know what that means.

Anyway, that takes care of that.

Proceed, Mr. Heller.

MR. FRIEDMAN: Judge, I think at page 54, the very next page the line --

THE COURT: You read that just to complete this.

MR. FRIEDMAN: Lines eight through fifteen simply make that clearer.

THE COURT: Read it.

MR. FRIEDMAN:

"Q Does the chief officer also inspect the vessel, cargo and other items with regard to safety directed towards other people than the crew?

"A He has" --

MR. KAIN: Read already, if your Honor please,

without objection.

MR. FRIEDMAN: Lines thirteen through 15 read?

THE COURT: It doesn't hurt to repeat, just to save time.

MR. FRIEDMAN:

"A He has a crew on board he is responsible for.

"Q How about other people coming on board the ship?

"A Generally.

"Q Do you make safety practices, general safety on board?

"A Yes.

"Q Do you observe all these safety conventions?

"A Yes, we try to."

THE COURT: All right, that takes care of that point.

Mr. Heller, please proceed.

BY MR. HELLER:

Q Captain, what does I.S.O. stand for?

A I.S.O. is International Standardization Organization. It is a unit of the International Labor office which has set standards for various industries regarding the use of equipment.

In the question of containers and container fittings, it was very urgent back in 1967 when they held their first meeting in Moscow, to set standards for containers and container fittings because it was an intermodular unit that might be used on a ship, taken off a ship and put on the chassis of a truck or even put on a piggyback train. If there were differences in fittings there would be nothing but confusion. So they standardized the fittings, the containers themselves and the containers that were on the fittings. This, when you read, I.S.O., they were first promulgated by the American Standards Association, taken up by the American Bureau of Shipping; then by the Ministry of Labor of England and then by the Lloyd's and then by the classification of other countries, Norwegian Veritas, the French Bureau Veritas. All of them accepted these as standards because everybody is getting into the container business and there would be nothing but chaos if there weren't standards.

THE COURT: He just asked you what it is. Let's try to listen to Mr. Heller's question closely and limit your answer to his question and then we can make some progress.

THE WITNESS: Yes, your Honor.

Q When we say an I.S.O. standard 20 foot container,

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does that only mean a 20 foot box?

A It means a 20 foot length with an eight foot depth and an eight foot width as their overall, with certain inner construction, certain door construction and certain corner fittings constructions.

Q Now, when you say corner fittings, what do you call these corner fittings on containers, on an I.S.O. 20 foot container?

A Well, there are different kinds of classifications. There are locking devices, there are stacking devices and there are deck fittings.

Q What are container stacking devices?

A The stacking devices are when you want to make the container more than one high, is a fitting that goes between the two containers on each corner that have points on the bottom and on the top so that when they are landed together they interlock. Those are the stacking fittings.

And between each height they have stacking fittings.

Q In other words, if it is more than one container high.

What do the stacking fittings do with regard as holding it as an integral rigid unit?

A Once the lashings are applied then it makes a

strong rigid unit that won't move. Even difficult to move if you take off the lashings, they will stay there in that position.

Q By the way, do you have with you any examples of container stacking fittings?

A Yes, I have.

Q What are deck container fittings?

A Well, the deck fittings is something welded to the deck or welded to a rod that sits on the deck and is secured that will hold it rigid on the bottom. When the container is landed on the deck on all four corners, it sets on this fitting and it won't move forward or aft as long as it is welded down.

Q Does that become part of carrying containers? In other words, there is a deck container fitting and container stacking fittings?

A Yes.

Q What is the effect of that, for example, at sea and in port? What does that do with the unit?

A Well, it makes an integrated solid unit that won't slide or wobble as long as the ship is stable. Even if it does wobble it will hold the unit together until it is lifted off of those stacking fittings or deck fittings.

Q Do you have with you some photographs of container

stackings?

MR. KAIN: If the captain is going to use any photographs or exhibits, may I ask before they are used they be marked for identification and shown to counsel so we have an opportunity to view them?

THE COURT: Yes.

xxx (Plaintiff's Exhibit 5 marked for identification.)

xxx (Plaintiff's Exhibit 6 marked for identification.)

MR. KAIN: May I see them?

MR. HELLER: Yes (handing).

(Pause)

THE WITNESS: I have some more.

THE COURT: How many do you want to use, Mr. Heller?

MR. HELLER: All of them, your Honor. They are made by many manufacturers.

xxx (Plaintiff's Exhibit 7 marked for identification.)

MR. KAIN: May we have a side bar?

(At the side bar)

THE COURT: All right.

MR. KAIN: Your Honor, please, I object to the use of these in Captain Ash's testimony unless and until the foundation be laid. For example, Defendant's Exhibit 7 for identification --

THE COURT: Plaintiff's Exhibit.

MR. KAIN: I'm sorry, Plaintiff's Exhibit 7 for identification, as I apprehend it, it refers to various cargo handling gear. It also shows illustrations of container ships with similar fittings and this type of arrangement, dragging arrangement and you see cranes moving up and down and lifting devices, all of which are not pertinent to a cargo ship.

If Captain Ash is willing to testify and if a foundation is laid that this equipment is all appropriate on a dry cargo ship, that is, of course, a question I will have to take up with the jury. Obviously I can't object to it. But without laying a foundation that these are fittings and lashings -- here, for example, is a ready-made assembly which, as I understand it --

THE COURT: You are talking about 5 for identification.

MR. KAIN: Yes. In other words, the gist of my objection is that as I understand it these are not fittings and lashings in normal use aboard cargo ships, by cargo ships.

MR. HELLER: They are.

MR. KAIN: A foundation has to be laid for it. That is all I'm asking.

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THE COURT: You proceed with your foundation. They are just marked for identification now.

(In open court)

BY MR. HELLER:

Q Captain, in my questioning of you, can you tell us the difference between a ship that is built from the keel up as a container ship and a ship that is built as a dry cargo ship or contains fittings for containers or has on board --

MR. KAIN: I have an objection. There is no testimony in this record that the Concordia Viking carried any fittings for cargo.

MR. HELLER: That is our argument. Will the defendant concede that?

THE COURT: I think it is a legitimate question slightly rephrased.

What is the difference between what is known as a container ship and a ship which is mainly bulk cargo and other kinds of cargo and carries some containers somewhere; okay?

THE WITNESS: Yes, sir. A container ship is specifically designed for carrying containers and has all the accouterments and fittings as mentioned as container fittings.

THE COURT: "Herein" being what?

THE WITNESS: Plaintiff's Exhibits 5, 6 and 7.

However, the regular conventional break bulk cargo ship would not have these normally unless they are used to carry containers. In which case they ought to have them if they don't. They normally wouldn't carry them unless they are in the regular business of carrying containers on deck. Normally they don't fit in the holds because it takes up too much space or they are too high for the 'tween decks But they do carry them on deck. If they are in the regular business of carrying them on deck, then they should have these fittings for stacking, for deck plating and the fittings for tops for attaching the hooks and the tension gear or the turn buckles, whatever it is.

MR. KAIN: May I renew my objection, your Honor? There is no testimony in this record as yet at least that the Concordia Viking regularly carried containers.

THE COURT: Objection overruled.

MR. LEONARD: I have an objection, your Honor, and I move to strike the answer. Apparently Captain Ash is testifying as to some point of law where he says that a dry cargo vessel ought to have certain fittings, which he says it ought to have. He hasn't made clear the basis of that statement and I submit it is an unsupported statement

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and it is inadmissible.

THE COURT: Overruled.

Q Now, on a vessel that is carrying containers on deck, and I am talking about a dry cargo vessel. We are not going to discuss, by the way, regular container vessel fittings. My questions are only to dry cargo vessels that are carrying containers on deck. Now, will you explain the benefit with regard to both loading and discharging containers of having I.S.O. deck container fittings and stacking devices attached to the containers?

A Well, first of all, the I.S.O. container itself is a standardized container and should be equipped when you are using them, carrying them, with I.S.O. fittings, deck fittings and stacking fittings. Also they should be lashed in the manner which is customary for containers to be lashed on any ship, whether it is a conventional container ship or a freight ship. That means that they shall be leveled so that they are parallel with the mast.

Now, the decks of ships have what is known as a camber on the main deck. That is a gentle slow sloping to the outboard side for water to run off. It is very minimal. It would be an average of one-eighth of a degree for eight foot. So if you have a 20 foot high, you may only have a two degree camber but that is enough to tilt the box.

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So you have to build up under it so that it will stand up straight parallel with the masts.

Then the lashings that come down should be such that any conventional container ship contains for a container; that is, all the bottom tiers lashed crisscross and then the next one, if it is only two high, then those same lashings hold the bottom of the second container and you don't have to go on top.

Q Now, Captain, what is the benefit with regard to safety in using these I.S.O. devices both when you lowered the containers and when you discharge the containers, taking into consideration that men have to work on them?

A The most important factor is that you do not get an inadvertent movement of the box when you least expect it. It is going to stay there. If a passing ship creates a small roll, a small movement or if the cargo gear all on one side of the dock has two or three drafts at the same time, may tilt the ship slightly. All of these factors are offset by the proper stacking devices. Your container won't move.

MR. HELLER: Your Honor, I would like to offer in evidence the Plaintiff's Exhibits 5 and 6.

MR. KAIN: I have the same objection I voiced, your Honor.

THE COURT: I will overrule the objection.

(Plaintiff's Exhibits 5 and 6 are received in evidence.)

xxx

THE COURT: You had three exhibits. You are not offering 7?

MR. HELLER: Just one page of 7, your Honor.

THE COURT: 5, 6 and part of 7.

MR. KAIN: The same objection to 7.

THE COURT: Make it 7-A then. You will remove the other pages from 7.

MR. LEONARD: May the record note I join Mr.Kain's objection.

THE COURT: Overruled.

(Plaintiff's Exhibit 7-A received in evidence.)

xxx

MR. HELLER: May I display these to the jury at this time?

MR. KAIN: If your Honor please, before Captain Ash continues, may I put an objection on the record on behalf of the defendant to his last statement in which he said that if the ship rolls the container moves. My objection is based on the grounds that there is no testimony from anybody in this record that this ship rolled at any time.

THE COURT: You are talking about tilt or roll?

MR. KAIN: I am talking about either a list on

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the ship or a roll on the ship. There is no testimony in the record and I ask your Honor to instruct the jury to disregard Captain Ash's remarks with respect to the rolling of the ship or the list.

THE COURT: Ladies and gentlemen, I think Captain Ash did say that the lashings were a good idea so that if there was a tilt on the ship at the pier, then it would prevent the containers from moving.

You said something to that effect; right?

THE WITNESS: Yes, your Honor.

THE COURT: It is a fact there is no testimony thus far that there is any tilt or was any tilt of the ship at the dock. So we will leave it at that.

MR. FRIEDMAN: I think you used the word lashings. I think he was referring to the stacking.

MR. HELLER: Stacking devices.

THE COURT: The whole panoply of apparatus.

Let's have the testimony read then.

(Answer read)

THE COURT: He is talking about devices in general but the main point was to avoid any confusion there has been no testimony at all that there was any passing ship which caused the vessel to roll, nor is there any testimony that the ship was tilted for any reason.

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MR. HELLER: I am just waiting, your Honor, for the jury to see the exhibits.

(Pause)

Q Captain, assuming a dry cargo vessel does not install deck container fittings. In addition assuming that containers come on board and these containers, even though they have holes do not have the container stacking device to make them a nonmoveable, rigid unit that can permit one container to be moved without disturbing another one beneath it or alongside it. Assuming those things, is there a custom and practice familiar to all ships' deck officers that dictates the manner in which this deck cargo is to be lashed or secured when it is brought on board or loaded on board a vessel?

MR. KAIN: If your Honor please, I object to the way counsel phrases the question. Captain Ash couldn't possibly testify to a custom and practice familiar to all deck officers which dictates. It is totally inaccurate. If he wants to ask the captain based on his experience is there a custom and practice I have no objection. But I object to the question as phrased.

THE COURT: Can you take that amendment?

MR. HELLER: Yes.

Q Modifying it based on your experience is there a

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custom and practice that you know of?

A Yes, there is. Basically the bottom tier of any type of deck cargo, where it gets the greatest force from any rolling or pitching, has to be secured independently of anything on top of it. Once something else is put on top of it, you need additional security. But that bottom tier, whatever it may be, whether it is machinery, vehicles, drums, anything, that bottom tier has to be secured first.

Q Now, how about if you place other container units alongside it, what practice or what custom and practice, based upon your experience, would you consider in securing each individual unit?

THE COURT: I don't understand that.

MR. HELLER: I will rephrase it.

THE COURT: He has talked about securing the bottom tier. Then you asked about other containers alongside. I would assume that is more of the bottom tier. Is that what you mean?

MR. HELLER: Let me rephrase it, your Honor.

Q Now, assuming that there is more than one row, individual row stacked two high of any deck cargo, containers or any other type cargo; how is this secured? What is good custom and practice based on your experience to secure this when it is first loaded?

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A It has to be chocked first so that it can be stowed tightly without any side movement of individual boxes, like they bump into each other or come up against each other. They have to be so secured and chocked with either braces between and shoring to the hatch coaming and to the bulwark, so that with the movement of the vessel, and the frequent movin; is the rolling of a ship, that the bottom won't shift, and that they are tied down. This is the biggest objective.

Then as you go up, so they don't slide, it has got to be tied down. But that bottom tier and the bracing of the bottom is of vital importance to the security of your deck load. If the bottom starts to move, who knows what is going to happen on top.

Q Captain, when you load cargo, do you also, when you load it, take into consideration how and when and where it is going to be discharged?

A Well, that is an important part of it. You must always have in mind the vague areas of discharging in different ports and different customs, plus the fact that while your cargo is enroute the consignee may be diverted to another port. So that your securing is such if you are going to keep it on deck and not discharge it, it is fixed. In the meantime, so it will not inhibit the movement of other cargo, you secure it so that the objective in discharging

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it will not interfere with the movement and working of your cargo.

Q Are you familiar with securing cargo with what they call like package tying it, that is, throwing lashings over the top and secure them so that it secures the bottom unit by pressing down? Are you familiar with that method of lashing?

A It is part of the deck load operations of making your whole unit solid. It is possible by going over the top and coming down to the sides to your deck pad eyes with proper fittings. Turn buckles as a rule are the most commonly used.

Q Now, assuming that cargo is tied in that method without the bottom tier being secured individually, do you as a master consider that good and proper custom and practice?

MR. KAIN: I object to the question as irrelevant. There is as yet no testimony in this case that the cargo was not secured on the bottom tier.

MR. HELLER: The deposition of the captain stated it.

THE COURT: You better point it out.

(Pause)

THE COURT: I guess maybe you are talking about

35; right?

MR. HELLER: Yes, your Honor.

THE COURT: Look at that, Mr. Kain, bottom of page 35.

MR. KAIN: Yes, sir.

(Pause)

MR. KAIN: Is your Honor referring to line 24?

THE COURT: I am referring to the testimony beginning at line 19, page 35, and going to page 36, line 12.

MR. HELLER: That is it.

MR. KAIN: May I ask your Honor to go back to line 10?

THE COURT: Of what page?

MR. KAIN: Same page, 35, your Honor.

(Pause)

MR. KAIN: I refer your Honor again to line 24 on the same page.

THE COURT: This is about a general practice. What is your point, Mr. Kain?

MR. KAIN: My point is that he is bringing it up. He is not asking him if it is the general practice. He is asking him, as I apprehend it, my understanding of counsel's question was that he was asking Captain Ash to assume

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that the bottom containers in this particular ship were not lashed during the transoceantic voyage.

THE COURT: All right. If he wants to ask him is it the custom and practice I have no objection. I object to him being asked to assume they were not lashed in this case.

THE COURT: He could not assume if there were no evidence at all in the case indicating such a thing. I am assuming, and correct me if I am wrong, that the captain was asked -- first of all, he had no memory of the exact way these particular containers were stowed. So he was asked about general practices on his ship. He testified about general practices on his ship. He testified to this package lashing, so to speak. The one that goes over the top and goes down and from this there would seem to be some evidence from which the jury could infer that that was done in our case.

MR. KAIN: May I note for the record as your Honor correctly stated, he was asked on page 17, "In fact you don't even know if they were lashed." We assume the captain has no recollection of how they were lashed.

Then with respect to the testimony on page 35 I have no objection to custom and practice if the captain wants to testify to it. I do not read the master's testimony

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to refer to package lashing. I will go into that later.

THE COURT: I may have used the wrong term.

MR. KAIN: All I am saying is that I object, and maybe I misapprehend counsel's question. I understood him to infer or to state that in this particular case the lower containers were not lashed.

THE COURT: He was.

MR. HELLER: Yes.

MR. KAIN: I say there is no such testimony in the record.

THE COURT: Ladies and gentlemen of the jury, as I will instruct you later it is your province to assess the validity of the testimony of an expert witness. Now that really involves two steps. First, if the expert witness is asked to assume certain facts you have to decide whether those facts have been proved or haven't been proved. If they haven't been proved, then the opinion based on those facts you throw out right there.

Secondly, even if you find that the facts have been proved, it is your job to assess the expert opinion as opinion.

Now, I am going to overrule Mr. Kain's objection, not finding that there were no lashings on the bottom tier of the containers. I am just saying that that is a question

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for you to determine. You have heard us read over two or three times now the testimony of the master as to what was done generally and it is a question for you to determine based on that evidence, and maybe other evidence, what was done in this case.

In any event, I am going to let Mr. Heller ask his question based on the assumption, with the caution to you that you have to be concerned about whether the assumption has been proved.

All right, that is a question for you, ladies and gentlemen.

Mr. Heller.

BY MR. HELLER:

Q Captain -- can my question be read back?

THE COURT: Yes.

(Last question read)

Q You can answer the question.

A May I answer it?

Q Yes.

A Yes, I do not consider that good practice.

THE COURT: I must say I thought this was going to be a more involved question than that, after all that discussion.

Have you anything else?

MR. HELLER: Yes, your Honor.

Q Captain, assuming containers all stacked two high are placed in a package, and I say package lashed by having wiring run one direction and other wires running cross direction --

MR. KAIN: Same objection, your Honor.

THE COURT: I'll overrule it.

Q And the vessel comes in for discharging, is there any custom and practice that should be followed, based upon your experience, by ship's officers at the time of discharging containers so lashed in that manner?

A Yes.

Q Can you explain?

A Well, when you are tearing down a deck stow you don't want the cargo adjacent to the load you got to move. So it is not customary to turn everything loose and say here it is, go ahead and take it. You turn it loose, you remove the lashings as you go along.

Now, normally these lashings have turn buckles with pelican hooks or releasing gear that it will stay put until you just loosen it a bit, give it a hit and it will fall down. But you leave it there so it won't move while you are moving an adjacent piece.

It isn't as though you are taking stacks of canned

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goods or stacks of drums or stacks of small pieces and putting them on a pallet. What you are doing is handling a big unit. While you have that big unit, which is critical, in its movement, you don't want anything else to move. So you should not turn it loose. In other words, cast off everything.

Q Now, is there a custom and practice with regard to the supervision by ship's officers of the discharging of these large deck units at the time that longshoremen commence discharging?

MR. KAIN: May I note for the record my same objection as to the stevedoring contract. Custom and practice I submit to your Honor in the face of a written contract providing for the supervision of the stevedoring operation, Captain Ash's testimony, I assume it, as to custom and practice, has no binding effect.

THE COURT: Is the contract in evidence?

MR. KAIN: It hasn't been put in yet but I will be glad to.

MR. FRIEDMAN: It is an absolute nondelegable duty to the ship owner whatever the contract might say.

MR. KAIN: That is not so.

MR. HELLER: I must object to the ship even trying to hide behind its duty --

THE COURT: Please.

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MR. HELLER: The shipowner waves a contract around --

THE COURT: Sit down a minute, please.

Where is your contract?

MR. KAIN: I have it here, if your Honor please.

THE COURT: Let's see it.

MR. KAIN: May I refer your Honor to subdivision (a) of paragraph 3.

THE COURT: Mark it for identification.

xxx (Defendant's Exhibit B marked for identification.)

THE COURT: What provision?

MR. KAIN: On the second page, if your Honor please, paragraph (a) under Roman Number I, where it says, "Stevedoring services."

THE COURT: All right, I will read it.

(Pause)

THE COURT: What is the question now?

(Question read)

MR. KAIN: May I note for the record, your Honor, I don't believe anyone would contend that the ships cannot contract for any duties that it did have. It may not be able to contract away an absolute nondelegable duty, but I submit the contract, in spite of Mr. Friedman shaping his head, we are talking now negligence and we are not talking

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about any absolute nondelegable duties, any insurance contracts. We are talking about a contract between the parties which I think speaks for itself.

THE COURT: I'll temporarily sustain the objection.

We are about to break, but I will sustain the objection for now and then we can talk about it after we break in a few minutes.

Let's continue to 4:30 with the witness on another subject.

BY MR. HELLER:

Q Assuming that a general cargo without any deck container fittings located on the port side or left side of the vessel, alongside number 5 hatch, takes on board in that area of the vessel eight I.S.O. 20 foot containers. These containers do not have attached to them any container stacking devices, but nevertheless have holes or appertures for same and the crew lashes all eight containers down, two containers high, in a package lash by throwing lashes over in two directions and creates a cube 16 x 40 feet by 16 feet high; and assuming that when the vessel arrives in the discharging port in New York, all lashings are removed or slackened by the crew and that there were no officers standing by or crew members, everybody was at breakfast, to supervise or direct or assist the longshoremen and at that point two

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longshoremen climb on an inboard aft container to hook up the inboard aft container to four container hooks to remove it and then moved to an outboard aft container to throw off slack lashings and while doing so the inboard container was raised. And as soon as it was freed from its place, the outboard aft container slid into the space, a distance of four to six feet, thereby hurtling a longshoreman some 35 to 40 feet to the water from the top of a container sixteen feet off the deck, do you have an opinion, within a reasonable degree of professional certainty, as to whether the ship's deck officers practiced good, proper and prudent seamanship in the manner in which this deck cargo was secured or lashed by the crew when it was received on board at the loading port?

MR. KAIN: Don't answer the question for the moment, Captain.

I have an objection.

THE COURT: I will sustain the objection.

Let's recess until ten o'clock tomorrow. I will hold the witness for a minute and the lawyers.

(Jury leaves)

THE COURT: What would be your answer, Captain Ash, as to whether there is a custom and practice as to ship's personnel supervising the unlashing, and so forth,

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of cargo such as these containers. What would your testimony be on that?

THE WITNESS: I would say that the officer in charge of the deck, usually the chief officer, must always be in attendance when abnormal, noncustomary lifts, such as containers, which are not normally carried on cargo vessels, or any heavy lifts, must be on deck to see that the rigging is proper, that the lashing is proper, and that there is nobody standing in the way of danger before the work proceeds.

Now, that doesn't mean he tells the stevedores what to do, it doesn't mean he tells anybody. But it is his responsibility. He doesn't stand there and let the stevedores tear the gear down over their head. He doesn't stand there and allow guys to be placed in a place where there will be an unusual strain. It is his job to stop it if that is the case.

THE COURT: You are talking about abnormal lifts; right?

THE WITNESS: Yes.

THE COURT: I take it that if this were -- what do you call a normal lift? The phrase you used was abnormal lift?

THE WITNESS: Yes.

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THE COURT: What is a normal lift?

THE WITNESS: The pallet size or a little cargo or small packages or drafts of bags.

THE COURT: If they are on deck they are supposed to be lashed; right?

THE WITNESS: Yes.

THE COURT: Then when they are being discharged they would be unlashed in some way and they would be lifted up and lifted onto the dock, right?

THE WITNESS: Correct.

THE COURT: You are saying if that is going on then there is no custom and practice for a ship's officer to watch over that; right?

THE WITNESS: No, your Honor. He is supposed to be on deck at all times when cargo is being worked.

THE COURT: Is he supposed to be on deck for the protection of the stevedoring personnel and to insure their safety?

THE WITNESS: Yes. Anybody that is working on that ship or comes aboard. For practical purposes, anybody.

THE COURT: I assume the stevedoring personnel are supposed to be protected from, you know, exploding boilers and stuff that are strictly the ship's responsibility. But I am talking now about problems that arise in the method of

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carrying out the stevedoring work; that is, the method of unlashing.

THE WITNESS: It is still the responsibility of the officers to see that it is done at the right time, not prematurely or not too late. It is still the officer's duty, he is still responsible for the cargo and the people on the ship.

THE COURT: I don't understand the differentiation you made when you first answered me about abnormal lifts and normal lifts.

THE WITNESS: Your Honor, I am trying to imply that the stevedores know their business and they generally proceed with the cargo discharge without one word of observation from the officers. They are satisfied with the work. Although at the termination of the work the stevedore company generally comes to the captain for a signature, that the cargo has been loaded or discharged to his satisfaction. If it isn't to his satisfaction, why do you want him there? They have to satisfy the master and his officers that it is done to their satisfaction. But their obligation is, it is their gear, it is their ship, it is their booms, it is their blocks, it is their winches. If something untoward is about to happen, it is their job to prevent it right then and there.

THE COURT: Why did you differentiate between abnormal lifts and normal lifts?

THE WITNESS: What I meant, suppose we have a whole deck load of pipes and cylinders. This is not abnormal. One officer would be roving back and forth. Now you have a deck load of containers at one hatch. This is not normal. You want the officer to be there.

THE COURT: I'm sorry, you say the whole deck is filled with what you call normal lifts --

MR. FRIEDMAN: What is not being perceived --

THE COURT: Let me pursue this.

MR. FRIEDMAN: It is as simple as this if you ask the witness. Whether the lift of a container from a non-container ship is an abnormal lift? If you find that out you will have your problem solved.

THE COURT: It won't help me one bit.

MR. KAIN: May I be heard on this?

THE COURT: I want to ask this: let's suppose you have a bunch of normal lifts lying around.

THE WITNESS: What we call general cargo.

THE COURT: Now, you just tell me what you are talking about that will help distinguish the responsibility of the ship's officers there from what it is with an abnormal lift. So let's start with the normal lifts.

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THE WITNESS: With the normal lifts he is there to see that they discharge the proper cargo, the cargo is marked and they know where they have stowed it and they don't overstow it or they don't discharge cargo prematurely for the wrong port. This is it. He can put a stop to that any time. That is what he is there for.

However, a container --

THE COURT: That is all he is supposed to do with the normal lifts; is that what you are telling me?

THE WITNESS: Yes. I'm saying his oversee is just a general observation --

THE COURT: To see they don't take off a bunch of pipe at one port that is supposed to go to another port?

THE WITNESS: Among other things. He is in general observation of what is going on. If he sees anything unsafe, it is his obligation to stop it then and there.

Sometimes a practice can be eliminated where he just goes to the hatch boss or the ship's foreman and says, "You have a cowboy in winch number 3. We don't need him. He can do that."

When you have heavy lifts or when we have lifts that are abnormal that take up so much of the space and the gear and it is a critical lift, then the officer must be there to observe it because anything can happen and often

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does. This is what I mean by an abnormal lift. Let's take a ten ton tractor or a huge truck or a big boxed piece of machinery that is almost as big as a container. This isn't something they are doing every minute and he has to be there because too many things can go wrong.

If there is any damage the first one they go to is the officer in charge, the master. They don't go to the stevedore.

THE COURT: What is he supposed to do? Is he supposed to tell the longshoremen the method of unlashing?

THE WITNESS: No. He discusses that in the beginning. Do you want it all turned loose, just this loose? We are not going to do this. We will have men there to turn it loose when you are ready to hook onto it. We will knock off the lashings, or will you knock them off?

MR. KAIN: Would it simplify it for your Honor that I expect to prove that the crew unlashed these containers?

MR. FRIEDMAN: All in advance instead of as each one was taken off.

MR. HELLER: We agree, your Honor. That is the case right there.

MR. FRIEDMAN: It is part of the case.

MR. KAIN: May I say this, your Honor, first of

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all Captain Ash is testifying to legal conclusions, the duty, the responsibility. These are all legal conclusions.

I submit to your Honor, at least it is my contention, and I expect to be able to prove it through custom and practice of maritime experts, that the ship is in effect interested in end results. They are interested in where the cargo goes because they have to worry about trim and stability of the ship. They are interested to see what it is properly completed. But I submit that the methods of operation or the loading methods employed by the stevedore, which is an expert and which is why they are hired and which is the only business they have and which, as your Honor can see from that contract, requires them to provide necessary supervision of the work; this is all the responsibility of the stevedore. Even if, and it is not so, but if the ship had such a responsibility I submit to your Honor they can contract it away. They can't contract away their warranty of seaworthiness obviously, but they certainly can contract away this if they had to, which I don't concede.

So my objection is that Captain Ash is being asked to testify as to a custom and practice which is interrogation of the actual contract in effect between this stevedore and this shipowner.

THE COURT: What Mr. Friedman and Mr. Heller are

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both telling me all at once is that here -- I guess what you are telling me is that here the crewmen did the unlashing. Are you telling me that?

MR. HELLER: I am telling your Honor they did the lashing in Saudi Arabia improperly. It starts out there.

MR. KAIN: No such testimony in the record.

MR. HELLER: Yes, there is.

May I be heard for a second? I'm sorry my opponent's expert is sitting in the court.

THE COURT: I thought you said something was stipulated.

MR. HELLER: They stipulated or their captain said that they lashed those containers in a certain way in Saudi Arabia. That was an accident looking to happen.

THE COURT: Before we get to that, where is the testimony about who lashed what?

MR. KAIN: I will concede the captain did so testify and I expect to prove we did.

THE COURT: Where is it?

MR. HELLER: In Saudi Arabia.

MR. FRIEDMAN: I have it all ready for the summation, 17, line 4.

THE COURT: Who is going to sum up?

MR. FRIEDMAN: Me.

THE COURT: Can't we have just one person before me? It really is confusing to have both people talking at once. I really lose you. You go too fast for me.

MR. HELLER: I prologized five times. It is Mr. Friedman's turn to sum up.

THE COURT: I will reserve on that.

MR. HELLER: On page 17, "The crew lashed these containers in Damman, Saudi Arabia."

MR. KAIN: That is conceded.

MR. HELLER: Going on into page 36 that your Honor noticed, it was a general practice, according to their chief officer, to package-tie things like this.

It is our contention that the crew lashing these containers under the possible supervision -- nobody knows who supervised it, but in reading the deposition you will see that, your Honor. When they lashed these in Saudi Arabia, they had an accident waiting to happen in New York. It is our argument that they didn't supervise the proper lashing in Saudi Arabia by the crew itself, not any independent stevedore, in order to take into consideration what would happen sometime later in New York.

THE COURT: Look, Mr. Kain, if the crew does the original lashing in Saudi Arabia, then when they get to

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New York, I guess what you are telling me is that they have a contract in New York or Hoboken with McGrath to do certain work in Hoboken, regardless of who did the work in Saudi Arabia; right?

MR. KAIN: That is true, your Honor.

THE COURT: Now, the contract, Mr. Heller says, the stevedoring company also agrees to provide stevedoring supervision as is needed for the proper and efficient conduct of work and safe and careful handling of cargo by longshoremen.

As far as what happens in Hoboken, what do you contend? Do you contend that the ship's personnel got in there and unlashed or do you contend that the stevedores did so?

MR. HELLER: As I said, it started there. When they arrived in Hoboken, now it was the ship's officers' duty --

THE COURT: Please, can you answer my question? What do you contend as to who actually did the unlashing?

MR. HELLER: The crew.

THE COURT: The ship's crew?

MR. HELLER: Yes.

THE COURT: How about that?

MR. KAIN: No dispute. If you will recall, most

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witnesses who testified said there were no turn buckles and he said there were some wires hanging down, loose ends. Nobody has testified yet that when these longshoremen, when this ship was alongside pier B and these longshoremen came on board to work, there is no testimony in this record that these containers were in any way lashed to anything.

THE COURT: Just a minute. They had been lashed at sea.

MR. KAIN: Absolutely, yes. They came something like 11,000 miles. They had to be lashed.

THE COURT: Good. Now we get to Hobcken and the lashings were taken off or loosened. That apparently, you all agree, was done by the ship's crew; right?

MR. HELLER: Yes.

MR. KAIN: No question about that.

THE COURT: Now, I take it that your contention is the stevedoring company takes over at that point and does everything else to unload; right?

MR. KAIN: Do what is necessary. It is our contention, if your Honor please, that somebody, if we had a gang of lashers on board, somebody, and with all due respect to Captain Ash, I don't agree with him that each unit is unlashed as it is done, but somebody has to unlash them.

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Obviously you can't pick them up with the ship's gear unless it has been unlashed. It is our contention having been unlashed the stow is then presented in deck cargo, not just at this hatch, is presented to the gangs of longshoremen who come on board with their ship's foreman, their own assistant, hatch foreman at each hatch, plus their headers, single men and it is their responsibility, the methods they use, how they spot the booms, how they rig, how they operate the winches, whether they use one man or two. The whole operation, that is my contention and I expect to prove it, is under the direction of the stevedore. I submit to your Honor that the only thing before you is this contract which says that they agree to provide, and we pay for this, incidentally, the necessary supervision for the proper conduct of the work, efficient conduct of the work.

THE COURT: Captain Ash, I take it from what you have said, and maybe I didn't get it quite right, that you believe it was improper to just unloosen all these things at once?

THE WITNESS: Yes, your Honor.

THE COURT: So you would find fault, if it is true that the ship's personnel just loosened all these things and they were either loose or removed, would you find fault there?

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THE WITNESS: Yes, your Honor.

THE COURT: Now, let's go to the next step, and I think I didn't understand you completely. Assuming that is done, that is behind us. Now, I don't know whether that is a good way to proceed, but what is the proper way to discharge these containers after -- when you are in the process of lifting them up, and so forth?

THE WITNESS: You do not turn loose the lower tier until you got the tier above it off. That is it. Then it will remain firm as a solid footing.

Also that even on the top tier when you have the outboard container in what is supposed to be a solid state, well stacked, and you move the other one. Even if it is slightly bumped there shouldn't be any movement of the top one.

THE COURT: What do you do with the top one then? You are actually moving the one top and the other one is staying for a little while, right?

THE WITNESS: Yes.

THE COURT: What is to be done with the other one?

THE WITNESS: For one thing you don't have anybody standing on top of it while they are moving them. You get them off there. That would be the first thing.

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THE COURT: Suppose they wander over there wrongly, who is supposed to tell them?

THE WITNESS: The chief mate stops the operation right now. Wait until these men get down period. He is not supposed to stand there and watch somebody get killed.

THE COURT: So you would say there was fault in the chief mat for not being there to tell these people to stay off the second container?

THE WITNESS: Yes, your Honor.

THE COURT: Now what else was wrong?

THE WITNESS: The fact that they were not stiffened in the stow itself. If they had had the regular stack fittings and they were only two high, there wouldn't have been the necessity for going up there to take off --

THE COURT: That was a problem that arose in Saudi Arabia, wherever they were put in.

THE WITNESS: It still existed when it got to the discharging port. This is the fault that I find.

THE COURT: So you have two faults. You have that the men were even permitted to go on top of the second container; right?

THE WITNESS: Yes.

THE COURT: And there wasn't the stiffening device to prevent the sliding?

THE WITNESS: Yes.

THE COURT: Now, aside from that should there have been -- aside from the stiffening device should there have been some lashings remaining on that second container?

THE WITNESS: No. At the bottom. They are secured at the bottom as part of the lashing of the first tier. Because where they are tied together with the container underneath, and I can't say something I haven't been asked but there is another feature involved here. Most container discharging, even when they bring a portable crane alongside, they have a regular spreader that fits on top of the container and they have a toggle on the sides that hooks on so that nobody has to go on top.

THE COURT: Let's not get into that. What you are saying is if it had been done properly, in your view, that bottom tier would have been lashed to the deck; right?

THE WITNESS: Yes, your Honor.

THE COURT: Of course, there would have been the fittings to prevent sliding?

THE WITNESS: Yes.

THE COURT: And then I take it that if it had been proper in your view, that according to your view the top tier, where would it have been lashed?

THE WITNESS: At the bottom, at the bottom of the

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second container down, tied together with the lower tier. You don't have to go on top then. You have it secured.

THE COURT: Wait. The top tier, are the lashings from the top tier, do they go clear to the deck or to the bottom tier?

THE WITNESS: Clear to the deck.

THE COURT: Now, we are at the point --

THE WITNESS: From the description I get.

THE COURT: I am asking you what is the right way to do it? Is the right way to do it to have the bottom tier lashed to the deck and then the top tier lashed to the deck?

THE WITNESS: You can't have too many lashings, your Honor. That is one thing. The more you have the better. But if you are going to be just simply adequate the bottom tier must always be lashed and then you lash that second tier at the bottom to the first tier. You don't have to go up on top.

THE COURT: The second tier to first tier?

THE WITNESS: You don't have to go on top to the second tier unless you have to hook on the bridles that are going to take it off. If it is the type of bridle that doesn't have a locking device of its own, it fits on top, you pull the lever and that hooks. They don't have that

type.

THE COURT: As far as the actual operation by the stevedores, whether they walked on top of it on the container or exactly how they are going to unlash, how they are going to handle that, you would say that the chief mate should have been there to supervise them; right?

THE WITNESS: Yes, to see to it that nothing was done improperly.

THE COURT: Now, there is this contract which says that the contractor also agrees to provide stevedoring supervision as is needed for the proper and efficient conduct of work and safe and careful handling of the cargo by longshoremen.

Now, are you taking into account such a provision in your testimony?

THE WITNESS: Yes. My understanding, your Honor, is that that contract doesn't give the stevedores carte blanch to do whatever they feel like, discharging the cargo however they want; that the ship's officer has to be the sole authority.

MR. KAIN: May I be heard for just a minute, your Honor?

THE COURT: Yes.

MR. KAIN: May I offer for your Honor's considera-

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tion that the Concordia Viking is a ship with five hatches, four of which are double rigged, designed to carry cargo where they use nine gangs of longshoremen on occasions to work cargo, where they have men in the hold, men on the dock, men on deck. Does Captain Ash suggest we subdivide the chief officer into 24 different parts or we carry enough deck officers to be in the hold and supervise, be in the dock and supervise, to be on the ship and supervise it? It is manifestly possible, it is an absurd statement I submit. There is no possible way. That is the reason that we hire stevedoring experts who do nothing else but and who have their own supervisory personnel for which we pay. They have an individual hatch boss with each gang. They have foremen, they have a ship's foremen, assistant foreman, they have a stevedore superintendent at the terminal. They have all of these supervisory personnel, all of which we pay for.

For Captain Ash to come in here and tell your Honor that regardless of contracts -- first of all, Captain Ash, I suggest is not competent to construe this contract, to tell you what this contract means, at least in my opinion, it borders upon the absurd.

MR. FRIEDMAN: I don't want to intervene, and may I be heard?

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THE COURT: Yes.

MR. FRIEDMAN: As I say --

THE COURT: Maybe I am just too picayune, but I really find the shifting back and forth of Mr. Heller presents me problems. There are differences of view apparently and you don't agree with each other all the time, and I have got to have a position on this point and I am going to ask Mr. Heller to present it and that is that.

MR. HELLER: I want to point out that the contract is there, but the contract still doesn't govern the practice of the men, that means the officers and crew of the ship. You can't on a ship which carries 20 foot containers turn loose all the containers, let them loose for five minutes, ten minutes or an hour, and have the stevedores take over just like that. You must work the two things. They must be juxtaposed, your Honor. Do you get my point?

THE COURT: The problem I have is this: and the reason I have spent all this time in trying to get into the minutia, it seems to me that the chief officer or the ship's personnel might very well have responsibilities depending on what you are talking about. I think if you are talking about whether the containers were being loaded at the wrong or unloaded at the wrong port, the chief officer might very well have an interest in being there to see that

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isn't done.

MR. KAIN: No question about it.

THE COURT: Or ultimately at least tally things up. I'm sure there may be other things which affect the interests of the ship in such a way that the chief officer would want to exercise some supervision in the carrying out of the stevedoring contract. But there is a contract with the stevedores and the stevedores have some responsibility. If you are talking about negligence, it seems to me that a proper delegation of responsibility is okay. We are not talking about unseaworthiness, we are talking about negligence.

In that regard if we are talking about, and let's take one particular thing Captain Ash mentioned, whether a couple of these stevedores walked from the first container over the top of the second container. Now I would think frankly that that would be something that the stevedore company is supposed to decide, and under the contract it is responsible for deciding and I think it might very well be completely out of order for the chief officer or the boatswain or somebody else from the ship's crew to stand there and say, "Oh, fellow, don't walk over there." That is the minutia of the handling of their duties.

Frankly I would think that that is so clearly covered by the contract that I don't understand how we can

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have testimony about custom and practice. It just seems to me it is made up out of something which has no regard for this contract.

As far as the other things which Captain Ash may be referring to, that the chief officer should have supervised at that time, despite my questioning, I don't understand what he is referring to particularly. So maybe I can't say. But if he is referring to the minutia of the carrying out of the stevedoring work, how they placed themselves, what their particular movements as to unlashing, and so forth were, I think it is covered by the contract. I don't see how he can testify as to some contrary practice.

MR. HELLER: First of all, we have the deposition where the captain himself said he is responsible, the defendant's master. He said that he maintained safety with regard to everybody who comes on board. So that is a basic custom and practice of a ship's officer. He started out with that premise, that everyone that comes on board the ship, even if it is a stevedore, is still the responsibility of the ship's officer.

You must remember that a container is a very large unit. It cannot be moved by mere manpower, and once it gets adrift it cannot be stopped by manpower. These containers are lashed, or they should have been lashed in a lot different

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way than they were.

THE COURT: That is another problem. That goes to the basic seaworthiness.

MR. HELLER: May I have just two minutes to argue?

Now, we have these large units, the captain said so, we all agree they are large units. We have them sitting here package lashed. The crew made the lashings and throws off the lashings. We agree to that, right, your Honor?

THE COURT: Yes.

MR. HELLER: Now, since they were done that way there was a duty and there is a dichotomy between discharging, taking the containers off, which a stevedore should do, and what the crew should do with regard to those containers.

Now, we use the word adrift, a nautical term. When you take these lashings off, you are on a ship, this is not terra firma. Even if that ship sits in Hoboken, they are still subject to movement. When you throw all those lashings off then you set up an accident to happen.

Well, there was a duty on the chief officer and the other crew members of that ship. They were all at breakfast. They should have been there at the time when they lose control --

THE COURT: How does that go to general custom?

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The point you are making is that it was negligent on the part of the ship's personnel to turn those things loose and you may be perfectly right on that. Captain Ash has so indicated. But then that isn't custom, that is negligence.

You are trying to get him to testify, you are asking him the question as to whether as a matter of general practice, not as a matter of making up for negligence, but as a matter of general practice the chief mate or his delegate should have been standing there to supervise the minutia of the handling of the stevedoring operation. I don't understand how he can testify to that.

I can understand how you can argue to the jury, at least under the present state of facts, that it was negligent the way the ship's personnel lashed them and it was negligent in the way they unlashed them and that created a dangerous situation. That may very well be a valid argument to the jury, but that is not the same thing as saying that it was custom and practice for the chief mate to stand there and supervise whether they were to walk onto the second container or don't walk onto it.

MR. HELLER: You see, that chief mate, whoever supervised the original lashing, and as I told your Honor, when you lash them you have to take into consideration when you are going to discharge them. That chief mate who super-

vised the original lashings knew when he ordered those lashings dropped that he had turned adrift, which the word I used again, 8 containers without any control over them.

My argument is, your Honor, at the same time -- first of all, all the containers had a right to be secured individually. Now, the proper practice, and I am only a lawyer --

THE COURT: Let me interrupt. Now let's suppose that things had been done right, that the cargo of containers had been lashed exactly the way Captain Ash said they should have been. They arrive in Hoboken and let's suppose that they had their lashings and their shoes and everything on. Now, let's further suppose that the ship's personnel came along and did exactly the proper amount of loosenings, no more, no less. Just everything done perfectly.

MR. HELLER: As the winches took control of the container. As the lashing comes off, the winches take control of the container.

THE COURT: I am saying the ship's personnel left the cargo in a perfect state of order for the stevedores to do their work, whatever that is, and I don't quite understand it but whatever that is. It was left perfectly. Are you with me?

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MR. HELLER: Yes.

THE COURT: Every recommendation followed. Now there does come a point where the stevedores are supposed to take over and do some work here; right?

MR. HELLER: Yes.

THE COURT: Now, we have followed good custom and practice up to now, right?

MR. HELLER: Yes, sir.

THE COURT: Now, the question would be, nobody has been negligent or anything, what is good custom and practice after that? Is the chief mate supposed to stand around and tell the stevedores how to do their work? Assume everything is in apple pie order. Is it the custom and practice for the chief mate to stand there and tell them how to do their work?

MR. HELLER: I didn't say how to do it but how not to do it negligently because that is his course he gets in Kings Point, your Honor.

MR. KAIN: I will stipulate this mate didn't go to Kings Point.

MR. HELLER: If he didn't, maybe he should have gone and we wouldn't have had the accident.

That is part of the cause. The responsibilities Captain Ash started out telling of the chief officer is from

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hook to hook, from the time that cargo comes on board the ship to the time it leaves, plus every man who comes on board the ship. It is his basic responsibility of the master or mate, whoever is in command.

This was an abnormal lift. At this point, and as I said before and your Honor agreed saying everybody did everything right; at the time the crew turned loose those lashings, at that moment or that second the winches of the ship should have taken control of that container, each one individually.

At that point the mate is there to supervise that the abnormal lift is done properly and that the men don't damage the ship, too, the ship's gear and the ship.

THE COURT: Let me ask you, Captain Ash, let's assume that everything has been done by the ship's crew that should have been done, up to the moment the stevedores take over. Now, is the chief mate supposed to stand there and tell the stevedores, "Oh, you move to this container and you get down on deck while something is happening"?

THE WITNESS: Yes.

May I read something important. I am only going to read the last paragraph of the responsibility for safety. "It should be apparent" --

MR. KAIN: May we know what the captain is reading

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from and may we know what he is talking about?

THE WITNESS: Talking about responsibility for safety in marine cargo operations by Saurbier, one of whom I consider the best authority in the business.

MR. KAIN: You may consider it, your Honor, but this can be taken out of context.

THE COURT: Let's hear what he has to say.

THE WITNESS: I am only reading the last paragraph. "It should be apparent for the good of the vessel itself and of the industry as a whole, the ship's officer should make every effort not only to keep their own gear and equipment in the best possible condition but also discourage the use of unsafe gear and practices by the stevedore and longshoremen."

That is only the last paragraph.

MR. KAIN: Is he talking about legal responsibilities? May I see Captain Saurbier's book?

THE WITNESS: Yes. Read the whole thing about responsibility. He had several references to it.

THE COURT: I think right now I would sustain the objection. Unless it is somehow clearer to me that there is something that Captain Ash is talking about which goes beyond the normal or goes outside this contractual provision, that the stevedore under the contract is supposed

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to provide stevedoring supervision as is needed for the proper and efficient conduct of work and safe and careful handling of cargo by longshoremen.

As a matter of custom and practice I would not think that the ship's officers would step in and do the job they had hired the stevedore to do.

Now, if the ship's officers and the ship's people have created a dangerous condition by their negligence, they may have a duty to do something. But that is different from custom and usage. I don't mean to -- maybe these are such fine points that they shouldn't be drawn and I certainly could be wrong in any event. But I think your case rests on the idea that the ship's people had created a dangerous condition, and that is the best way for you to present it. That is the way I read it.

MR. KAIN: May I , just for the record, before we leave this, may I quote from Captain Saurbier's preface to the book from which Captain Ash just read to you as follows: "Much of the text is based on scientific fact but there are a number of recommendations regarding methods, procedures and even philosophies that are set forth as best purely in my own opinion."

THE COURT: That is all we can do tonight. See you at ten o'clock tomorrow.

(Adjourned to October 9, 1975, at 10:00 a.m.)

rd/lf/217

ANTON PICINICH

vs.

CHRISTIAN HAALAND & BOISE-GRIFFIN
STEAMSHIP COMPANY, INC.

---------- 71 Civ 5357

SKIBS A/S SAMUEL BAKKE

vs.

JOHN W. MC GRATH CORPORATION

October 9, 1975

(In open court - jury present)

THE COURT: May I see the lawyers at the side bar?

(At the side bar)

THE COURT: I thought at some further length about that matter that we were discussing last night and I would like to have the question read that was objected to which led to this long colloquy.

(Last question read)

THE COURT: Several things come to me that I'd like to state. I think that our discussion as it went along focused on some other matters beside what was actually in the question. And I don't want to anticipate something, but as long as we discussed I think I might as well.

As I understand it, Captain Ash will testify that despite the existence of the contractual provision

which you intend to introduce, Mr. Kain, he would testify that it was the custom and practice in the maritime field to have ship's officers or personnel there to give certain types of directions to the longshoremen.

Now, I think this is a little different than the question precisely asked.

MR. KAIN: That wasn't the basis of my objection.

THE COURT: Let's just anticipate they will ask that question. I don't know whether they will or not. But I think I said last night that I thought I would exclude that kind of testimony because it seemed to me in contradiction to the contract and what I would consider a sensible interpretation of that contract. But that isn't really a grounds for objection. That would mean the testimony is wrong, but being wrong doesn't mean the testimony is irrelevant.

So if and when a question along that line is asked I would find it, I think, difficult to say that it is irrelevant. It seems to me it is open to very serious challenge.

I know we had a long discussion and I don't want to cut you off but I don't want to repeat that.

You have your record, you objected to that line of questioning. I think I would overrule the objection,

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recognizing as I do in my own mind that it has very serious problems about validity. But that is not, just because the testimony is wrong, doesn't mean it is irrelevant. It is for the jury to determine whether it is right or wrong.

Now, secondly as to the specific question here, I can understand you are going to take over the interrogation of the witness, but I have a problem --

MR. FRIEDMAN: I will not persue the question that was read. I will start with another one, to shortcut it.

THE COURT: I would appreciate you starting it over and not using that question.

The trouble I have, I am going to try to get my thinking better ordered but I have a little trouble understanding some of the premises of these questions because I am not perfectly clear in my mind as to what you consider you have proved in your factual case. There was a language difficulty with the two eyewitnesses; the testimony of the captain was not based on personal knowledge but was based on general statements, all of which somehow has produced in my mind a little less clear idea of what you contend has been proved as far as what was not done right or what was done right.

MR. FRIEDMAN: May I say this, your Honor? I would

say that the proof presented before tne Court on a prima facie basis is that there was an absence of stacking devices, the I.S.O., the cuts that you have now seen, Exhibits 5, 6 and 7, were not there.

THE COURT: I got that.

MR. FRIEDMAN: One might almost stop there, but also that the method of lashing that was used on the onloading in Saudi Arabia was this package lashing of the entire cube instead of the lashing procedure which is indeed the proper one that is shown on the cuts.

THE COURT: I have that.

MR. FRIEDMAN: Thirdly, that when the vessel arrived in the port of New York, Hoboken pier, with those conditions, that before the stevedores commenced their work at eight in the morning Monday, the ship's crew went about undoing, slackening all of the lashings and the turn buckles associated with the lashings. So that the lashings were present but in a slackened, nonsecuring condition.

THE COURT: Well, that helps me.

MR. FRIEDMAN: Those are the premises that I think are in the evidence.

MR. KAIN: May it state for the record, for the record may I state defendant's objection to two attorneys handling in succession the same witness.

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Secondly, may I point out to your Honor that insofar as I know there is no testimony in this circuit, at least as of now, as to what type of lashing was put on these containers.

THE COURT: I understand your position on that. I think that I am going to permit -- I want to say this: Mr. Friedman came to see me at about six o'clock last night and simply told me that he would propose to handle all the questioning from here on out. I didn't acquiesce or not acquiesce. I am going to acquiesce in this because in view of the present posture of the case, I think it would be better to have one attorney and I think it is up to these gentlemen and the plaintiff to select that one attorney.

I would like to say that I think if we were able to turn the clock back many months it would have been helpful to have Mr. Friedman participate in the pretrial, if he was going to try the case. But that is past history and we can only deal with the situation as it exists right now. And I think it will be helpful to have one or the other of them take it from now on. It is perfectly acceptable to me to have Mr. Friedman.

Let's go.

(In open court)

W I L L I A M C H E S T E R A S H, resumed.

THE COURT: Ladies and gentlemen, let me say this: the attorneys have discussed with me about the handling of the case and for the sake of good order and efficiency both Mr. Heller and Mr. Friedman will be at the counsel table for the plaintiff, but Mr. Friedman will do all of the questioning and cross examining and do all of the speaking from now on on behalf of the plaintiff.

I apologize for the delay this morning but there were a couple of things we had to go into.

All right, Mr. Friedman.

MR. FRIEDMAN: Thank you very much, your Honor.

DIRECT EXAMINATION CONTINUED

BY MR. FRIEDMAN:

THE COURT: I have to also announce I told you on Monda, that I thought the case would finish this week. Now, lawsuits are terribly difficult to predict and these gentlemen, I feel, have used the time efficiently and I really have no complaint about any delay or prolongation. There has been the normal interchange between me and them, if I feel something might be shortened a little bit, but that really has not been of any substantial consequence as far as time.

I think the estimate of a week hasn't turned out

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for two reasons: one of them is, and I apologize for not telling you this, I take every other Friday as a motion day. I hear motions. And Friday, the 10th, this Friday is a motion day. So I will not sit on this case on Friday. I had thought we could finish in four days and be finished by the end of the day Thursday, perhaps spilling over to Friday as far as your deliberations, but I could then go ahead with my motions.

Despite everybody's best efforts that is not possible. I think we will probably come pretty close to finishing today as far as the evidence, but the lawyers have to sum up and I have to instruct you. So we have to adjourn at the end of today until next week.

Next Monday is a holiday, Columbus Day. I would be perfectly willing to sit. I am going to be here anyway, but I assume that most everybody has long weekend plans. So unless the jury positively wants to sit on Monday you can certainly indicate it. As far as I am concerned you can have the holiday and we will resume on Tuesday.

I think on Tuesday I don't know exactly what course the remainder of the trial will take down to the last hour, but I would expect we would be -- can you help me out?

MR. KAIN: I was going to ask your Honor, perhaps

without making any undue disclosure, Mr. Friedman could tell me whether Captain Ash was his last witness.

MR. FRIEDMAN: I thought we told him that yesterday.

THE COURT: That's right.

MR. KAIN: All right, sir.

THE COURT: So I think that the proof will be finished pretty much by today. Maybe it will spill over a little bit to Tuesday. It may be that I can charge you Tuesday and you can deliberate or at least start deliberating. It may be that it will spill over a little bit to Wednesday. That's the best I can tell you right now.

Go ahead, Mr. Friedman.

BY MR. FRIEDMAN:

Q Captain Ash, I want you to assume if you would, please, that we have heard testimony in this case through the deposition of the Concordia Viking that these containers, these I.S.O. containers, eleven or twelve of them, were onloaded in Saudi Arabia and that they arrived in the port of New York, the Hoboken pier, without stacking devices of the type you have identified to us as being in regular and ordinary use at that time in what I will call the cuts, the photographs in Exhibits 6 and 7-A.

Now, Captain Ash, just going step by step, as to that specific aspect loading containers of this size and

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nature on a general cargo ship, a ship that is not built as a container ship, in two tiers, without using stacking devices, lock shoes, whatever they might be called, between the bottom tier and the top tier, can you tell us, sir, whether that was safe, proper and customary seamanship and practice?

A Yes. As far as the carriage for the overseas passage. Securing it to the deck by lashings, package type would carry it safely across the ocean. It would carry it safely to its destination.

However, it would not be adequate as far as the handling of them and the discharging of them once the lashings are removed.

Q Captain, let me study that. Is it, can you tell us, physically possible -- I don't mean in the sense that everything is possible, as we land people on the moon, but in a reasonable degree of possibility to install, to inject these devices, shoes, stacking devices, between the bottom and top tier in such a situation after or when the vessel arrived in its offloaded port, in this case New York, if it is not done at the time the boxes are onloaded?

THE COURT: Let me hear the question.

MR. FRIEDMAN: I will withdraw it if it is not clear.

THE COURT: It is probably my fault. Just ask

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the reporter to read it over.

(Question read)

THE COURT: Go ahead.

A My answer is it is not possible or practical.

Q My next question is this: in terms of safe, proper and seamanlike practices, in 1975, let's talk in those terms, were considerations of the problems, the aspects of offloading part of the considerations to be given concern when the onloading is occurring?

A Yes.

Q So then, Captain Ash, my question to you is this: at the time these containers were onloaded in Saudi Arabia on this ship, the Concordia Viking, can you tell us, sir, should or should not stacking devices, shoes of this nature, have been employed and put in place between the bottom tier and the top tier?

A Yes, they should have been used.

Q Now, I think you have already told us that even if those devices, or as in this case the device is not used, that with sufficient deck lashings the containers could make the oceantic voyage to the next port?

A Yes.

Q Now, from the point of view of being concerned or dealing with the offloading prospect that was, of course,

the next part of the chain, at the time that the containers were placed on the ship in Saudi Arabia, do you have an opinion as to what safe and proper practice and seamanship required, specifically as to the manner of the deck lashing? By that, if I may point your attention, I mean as to whether the lashings should have been thrown over the top of the second tier and brought directly down to the deck, or should have been tied to the bottom of the second tier, et cetera? Do you understand what I am asking you about?

A Yes.

Q Would you tell us what was, in your opinion, the proper practice that should have been followed?

A My opinion is that if the proper attention to the offloading was paid at the time of loading, the lashings and the lashing gear would have been administered in such a way that an orderly, safe procedure of offloading would have been in effect as soon as they started the offloading procedure.

Q Captain Ash, with all due respect, what I want to know is specifically what you say, if you can describe it physically, what you say the lashing procedure should have been. Where should the lashings have been applied? I take you are saying they shouldn't have been applied over the top. Where should they have been applied?

A With the stacking fittings, and only two high, they should have been secured to the deck with the proper lashing gear of either turn buckles or tensioners to tighten up the wires from the bottom of the top container.

Q With the Court's permission, can you tell me whether Exhibit 5 shows in, I'll call it the cut, if that is the proper term, shows the lashing procedure that you say should have been employed?

A Yes, it shows it very clearly on the lower right-hand side and also on the lower left-hand side for two high.

Q For the two high?

A One high, two high.

Q Let's deal with our case. Our case is the two high.

A Yes, sir, in both instances --

MR. KAIN: May we mark the document for identification before we proceed.

THE COURT: This is Exhibit 5 in evidence.

MR. FRIEDMAN: Yes. And, Mr. Kain, if the Court would permit, I would draw an arrow to the two items pointed out, for his benefit.

THE COURT: All right.

MR. FRIEDMAN: I will do that in front of everybody

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(drawing).

May I show it to counsel first before I show it to the jury?

THE COURT: Yes.

(Pause)

MR. FRIEDMAN: May I hand it to juror number 6 first?

Ladies and gentlemen, are my arrows visible?

(The jury indicates in the affirmative.)

MR. FRIEDMAN: I think there are some questions which I can ask while they are looking at the document.

THE COURT: You should wait. Then I would like to see it after the jury has.

(Pause)

Q Captain Ash. I don't know if we have gotten this out yet for the record, but approximately what range do these I.S.O. 20 feet by eight feet by eight feet containers weigh empty?

A From 3650 pounds, whichis about a quarter of a ton less than two tons, to a maximum of a quarter of a ton over, within that range.

Q A quarter ton range of two tons more or less?

A Yes.

THE COURT: Minimum 3650?

THE WITNESS: Yes.

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THE COURT: Maximum what?

THE WITNESS: About the same amount over two tons, which would be three hundred tons over --

Q You said tons, you meant pounds?

A Yes. That's the I.S.O. class C container.

Q Now, Captain Ash, in the circumstances of this case there came a time when this vessel at 8:00 a.m. in the morning was alongside pier C, if I recall correctly, in Hoboken, for discharge of these containers that had been onloaded in Saudi Arabia; correct?

A Yes.

Q And at that point in time there were no stacking devices, container locking devices or locating pins, these items that are referred, none of the different types, in place between the first and second tiers, and the lashings with their turn buckles were over the top.

Now, my question to you is this: assume, if you will, that there is evidence before the Court that before the stevedores commenced their work of offloading and lifting off these containers, that the ship's crew at some time before, whether it was fifteen minutes, half an hour or an hour or two hours, but at some time before 8:00 a.m., went about and undid, unsecured the lashings with respect to these various containers but left the lashings there but

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slack. Did you hear that testimony and evidence presented?

A Yes.

Q Now, bearing that in mind, focusing on that, my question to you, sir, is what is the undoing, the making slack of the entire, shall I say, run of lashings for the various containers in advance in that way, a proper, customary and safe practice with respect to the offloading procedures that then had to be employed by the stevedores?

A No, it was not.

Q Would you explain, please, what you are referring to and why you say that?

A The method of lashing, the customary and accepted practice, is such that you do not have to let the whole mass adrift just to remove one container. You can knock off the lashings one at a time. And only the container that you are going to work on will be allowed to move. Then you move to the next one. You knock off the turn buckles or the tensioner clamps, the proper equipment, in a matter of seconds and you take the next one off. You don't turn the whole mass adrift because that is an invitation to a catastrophe.

Q Now, Captain Ash, let me ask you this: the answer you have just given, the statement you have just made as to what is the proper practice, would it be the same or

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different if we assumed that stacking devices, these I.S.O. locks or shoes as they are sometimes called, were present between the bottom and the second tier?

A If the proper gear was in use, there would have been no problem developed that would preclude there doing it in the proper and safe manner.

Q I don't think I have a direct answer. May I repeat the question? And maybe I will have to rephrase it.

THE COURT: Please do.

Q Captain, you told us that when containers of this substantial size and weight arrive in the offloading port under deck lashing, that it is not appropriate to, so to speak, in advance lay the lashings slack but rather to wait with each container until it is just ready to be lifted off before you undo the lashings; did I understand that to be your testimony?

A Yes, yes.

Q And perhaps let's just deal with that before we go to the next question. When you say that can you tell us, can you spell out to us so we can see the picture, what is the proper time gap that you say should be followed with respect to the, so to speak, release of the securing of the containers by means of their deck lashings and the taking

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up of that container by the winch being used by the stevedores to lift off? What kind of time gap should exist?

A The sequence should be one at a time that you are releasing.

Q I understand the sequence is one at a time. Now, Captain, my question is how much time should pass between, minutes, hours, weeks, seconds, between the release of the lashings of the ship and the picking up of the strain and the holding of the container by the winch? How much time should pass between those?

A A matter of portions of a minute.

Q In other words, essentially a simultaneous together operation?

A Essentially it is a simultaneous movement.

Q Now, my other question was this, Captain: that procedure that the containers should be taken off one by one, which I suppose, by definition, the winch has to lift them off one by one, and that the time gap between releasing the deck lashings that are holding them to the winch which will then hold them, the winch hook, from the winch to the hook, being an almost immediate situation, is that practice the one that should be followed even if stacking devices have been employed in the onloading?

A Yes.

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Q Now, if stacking devices have not been employed in the onloading and these groups of containers don't have stacking devices between the bottom tier and the top tier, does that increase or diminish the necessity of following the practice -- I won't redescribe it -- that you have just outlined?

A It eliminates it completely. You can't use a safe method when you turn them all loose at once. You can't use a safe method. Your homogenous mass of the four all are loose and ready to move. You can't do it individually.

Q Perhaps my question is not clear, Captain. Please assume only what I am giving you only in this particular question. Don't recapture what I asked you before. Try and make that mental adjustment.

Assume if you will two situations hypothetically side by side. One is that the Concordia Viking with these eleven, twelve cargo containers, deck lashed, ready for the offloading by the longshoremen but with stacking devices having been used when they onloaded them in Saudi Arabia; all right? You have already told us that the proper practice would be to undo the deck lashings essentially simultaneous with the winch and the hook taking them off; right?

A On each individual container.

Q My question is, dealing solely with this aspect,

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if the stacking devices were not employed would that increase or diminish the importance of following this one by one and simultaneous pick-up procedure that you have just described?

A It would diminish -- it would eliminate it. You couldn't pick up one at a time in that manner when they are all loose. This is what I am trying to say. You take off all the lashings; you cannot safely pick up one at a time.

Q I understand. You have already told us. My question is not perhaps clear, Captain. Let me put it this way: what is the function of the stacking devices?

A The stacking devices in conjunction with the lashings make the unit practically immoveable while you are working on one.

Q Now, my question simply is this,Captain, and maybe it is rhetoric and maybe that is the problem.

If the stacking devices had not been employed, is this group of containers more stable or less stable?

A Less stable.

Q Now, Captain Ash, the practice that you have stated that should have been followed with respect to the, so to speak, simultaneous or continuous flow aspect, the lashings -- the turn buckles being loosened just as the winch takes it off; the winch itself is being operated by

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what group of men?

A The longshoremen.

Q The undoing of the lashings in the circumstances that we are here dealing with, container cargo, this kind of ship, this kind of equipment, who should, in proper regular practice, what group of men would be undoing the lashings and the turn buckles just as the longshoremen are lifting off the individual container?

A Normally it is the crew that turns the lashings loose.

Q Now, in any case, Captain, whoever would do that work, let me ask you this: was it proper practice for the ship's crew to have come along sometime earlier and lay slack all those lashings?

A No, it was not.

Q Let me ask another question on that, Captain. Without going over what you have already told us, once they were doing that, laying slack the lashes, were those lashings, once they were laid slack, even if they were still present, were they doing anything, having any effect in holding these containers in place in any way?

A None whatsoever.

Q So can you tell me this, Captain Ash: was there any purpose or benefit that you can understand in leaving the

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lashings around and on top of the containers once they were made slack?

A There is no advantage in it. It impedes the discharge.

Q Once they were laid slack but the ship's crew, which you told us was not a proper practice, but regardless, once that was done, can you tell us whether there was anything called for by way of safe and proper practice as to removing those lashings instead of leaving them there for the longshoremen to remove? In other words, what should the ship's crew have done once they were doing what they did? Once they did do or lay slack these lashings, should they have left them there for the longshoremen to have to go up and remove?

A No. They should have finished the job they were doing.

Q Now, Captain Ash, assume if you would that in the circumstances of this particular situation what we have is a vessel such as the Concordia Viking at pier with these eleven or twelve substantial cargo containers in which stacking devices were not employed between the bottom and second tier, and for whatever reason all the deck lashings had been laid slack and that it is now time to offlift, offload the containers, my question, with the Court's permission,

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is can you tell us what proper and safe practice would call for with respect to the presence or nonpresence of a mate or chief officer of the vessel at the time that next step is to be taken, the offlifting of a container under those circumstances?

A There should be an officer there to see that the operation proceeds safely.

MR. KAIN: May I note for my record, your Honor, the same objection I had yesterday?

THE COURT: Yes. Overruled.

MR. LEONARD: Joined in by me, your Honor.

THE COURT: Overruled.

Q Captain Ash, can you tell me this: the fact that stacking devices were not employed during the onloading and voyage of these cargo containers, can you tell me under ordinary practice would this be a circumstance in the regular pursuit of duties that a chief officer, that mates of a vessel would customarily know of?

A Yes.

Q And the fact that the deck lashings had been all laid slack for the entire group of containers sometime in advance of the stevedores starting their procedures, would that procedure by the crew be something known to the ship's chief officer or mate in charge?

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A Yes, it should be.

Q Maybe just one word to cover this, because some of us may know this and some of us may not. A ship's crew is divided into more than one department?

A Yes.

Q Just quickly how many?

A You have the deck department, the engine department, the steward's department, the radio department.

Q The department that we are concerned with in terms of the handling of deck lashings and all of these aspects is which department?

A The deck department.

Q And the officers who are directly involved and in charge of the deck department work are which officers?

A Chief officer.

MR. KAIN: If your Honor please, I object to any testimony by Captain Ash on procedures aboard a Norwegian flag vessel unless a proper foundation is laid to indicate Captain Ash has some knowledge of those procedures.

THE COURT: Let me hear the question, please.

(Question and answer read back)

MR. KAIN: I don't object to that question. I object to Captain Ash testifying about procedures on board Norwegian ships.

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THE COURT: You are saying these are general procedures.

MR. KAIN: In essence he is testifying to a procedure aboard a Norwegian flag vessel.

THE COURT: If this is not the procedure on a Norwegian flag ship, you can correct it. His testimony is general.

MR. KAIN: With that understanding, all right.

THE COURT: Am I right?

THE WITNESS: Right, your Honor. A chief officer, second officer, third officer and sometimes a junior third. They are licensed officers.

Q They are the men who supervise and direct the ordinary seaman, or whatever they might be called, apprentices which I think we had read in the deposition, who make up the unlicensed personnel of the deck department crew; correct?

A Yes, but there may be a boatswain in between.

Q Would it be fair to say in land language that he is the foreman of the working men in the deck department?

A The boatswain is the foreman.

Q And if the crew lift, Exhibit 4 in evidence, of the Concordia Viking specifically shows as numbers 2, 3 and 4 on the crew lift, chief officer, first mate, second mate, and number 6 is boatswain, and then there is ablebodied,

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one ordinary seaman and two apprentices or one called a young man and the other called apprentice, are these the men that form the deck department?

A Yes.

Q And just one last question. The removal of the deck lashings in the manner that has been mentioned, all of them before the stevedores started, would that be under ordinary practices something that was subject to the order and supervision of some officer of the deck department of the vessel?

A Yes.

THE COURT: Mr.Kain?

MR. FRIEDMAN: I didn't finish. I was just putting down the exhibit.

THE COURT: I thought you had finished. I'm sorry.

Q Then, sir, in July, 1971, if these procedures, and I won't repeat them, which we just covered, had occurred in the workings of the deck department of that vessel under safe and proper practice, should some officer of the deck department been present when one of those containers was offloaded?

THE COURT: You asked him exactly the same question.

MR. FRIEDMAN: You are absolutely right, your Honor.

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I'm sorry.

Q Captain Ash, under the circumstances here present on the Concordia Viking, July 12, 1971, in the morning, eight or nine in the morning, and I won't repeat them because we have gone over them a number of times, but can you tell us this: assume a longshoreman was directed by his immediate superior to go up, use a ladder, onto one of the containers, in fact onto several of the containers, to remove slack deck lashings that had been left there and were there. Assume that having removed those slack deck lashings from the top of one container and having installed the hooks necessary to lead to the line that leads to the boom that leads to the winch that lifts off the containers, as was part of his job; that he proceeded to the next container of that second tier on the top to continue with what was essentially the same work that was required for that one, there being similarly slack deck lashings having been left there by the ship's crew and similar work to do.

Assume that in the -- that what then followed was that the first container, we will call it container one, was begun to be lifted up and out while he was doing this work of dealing with the slack deck lashings on the top of container two. Assume that as that container one lifted off, some scraping against container number two, lifts out

of the space in this overall what you call modular cube that it had formerly occupied, and assume that as as and after it does so container two suddenly slips and slides two to four to five to six feet into the space that had been formerly occupied by container one.

I want to take this step by step. Assume that there was a failure to use any of the stacking devices for this container two with the container underneath it in the bottom tier when it was onloaded and that, therefore, there was a nonpresence of stacking devices at the time specifically in question. Can you tell me, sir, was the absence or failure to use those I.S.O. stacking devices a competent contributing factor with respect to that movement, that slipping of the container two on which the man was?

A Yes, it was.

Q Without repeating it, the same facts and circumstances, assume that, as I have previously mentioned, sometime before the stevedores commenced their procedures the ship's crew, and assume under the direction of a ship's officer removed, laid slack all of the deck lashings instead of following the practice you described of keeping them taut until it was time for the winch and its hook to take off that particular container. Can you tell me, sir, whether that fact, the following of the practice or procedure of

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laying slack all the deck lashings sometime in advance, was a competent contributing factor with respect to the stability or lack of stability and movement of container two on which the man was standing?

A Yes, it was.

Q Can you tell me this, sir: would it be fair to say that both of those conditions, the absence of stacking devices and the laying slack of the lashings were conditions that existed for at least some period of time before the moment of the accident?

A Yes.

Q Captain Ash, when containers -- assume, if you will, when these containers were onloaded they were placed in what I would call essentially substantial proximity with each other so their vertical walls were either against each other or quite close to each other, according to the evidence that we have; no walkways or gaps apparently were left between them; okay?

When one of those containers is to be lifted off for the offloading under the types of booms and hooks, winches and distances involved, and considering the size of the box being handled, 20 feet weighing close to 4000 pounds, can you tell us what is to be, so to speak, contemplated in terms of the vertical wall of the container being lifted

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off, touching or not touching, bumping or scraping against the vertical wall of the container immediately next to it?

A The situation is that you cannot, with such a long bulky object, make a snatch lift and pull it away instantly. You have to pick it up slowly and steadily to prevent the swinging and prevent excessive motion that would eliminate your controlling it. So you must anticipate that when it goes up, until it gets absolutely clear, it cannot avoid bumping the side of the container next to it.

Q And, sir, if that container next to it has no stacking devices between it and the one immediately below it, sir, what is the effect of that failure, that absence of stacking devices on the stability of container two if it does get bumped against?

A It will move.

Q Sir, is it safe and prudent seamanship, is it consistent or inconsistent with a safe or unsafe place to work, for the longshoremen doing the offloading work to have container cargo of thise size, I.S.O, without the stacking devices and with loose deck lashings up on the top of the second tier and a container being lifted off immediately adjacent to where a man is standing doing his work; does that constitute a safe or unsafe working condition?

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A It is unsafe.

Q Perhaps to put it another way, can you tell me, sir, is a container of such a nature -- I will call it container two -- if it is properly, prudently secured and stowed, is it supposed to slip and move in the way this container is described to have done?

THE COURT: The suspense is killing me. What would his answer be? I think we have heard this in so many ways, Mr. Friedman.

MR. FRIEDMAN: That was my last question, your Honor. It was intended to be my last question.

THE COURT: Mr. Kain.

MR. KAIN: Your Honor, before I proceed, may I have a word with Mr. Friedman?

THE COURT: Yes.

(Discussion off the record)

MR. KAIN: I understand, if your Honor please, there is no objection from counsel to my putting in evidence a ship's plan of the Concordia Viking.

THE COURT: All right.

(Pause)

xxx (Defendant's Exhibit C marked for identification)

CROSS EXAMINATION

BY MR. KAIN:

Q Captain Ash, in connection with your preparations in this case, your conferences with --

THE COURT: Are you introducing Defendant's Exhibit C into evidence?

MR. KAIN: I thought I just did, your Honor.

THE COURT: Defendant's Exhibit C received in evidence.

xxx (Defendant's Exhibit C received in evidence.)

Q Now, Captain Ash, in connection with your preparation, conferences with Mr. Heller and Mr. Friedman with regard to this case, did you prepare any memorandum or any notes?

A No.

Q You have sat here through a good portion of this trial, have you not?

A All of it, except the medicals.

Q Now, Captain, I believe, and correct me if I am wrong, you told Mr. Heller yesterday, in answer to one of his questions that the camber -- you explained what the camber of a deck is aboard ship; is that correct?

A I mentioned it. I don't know if I thoroughly explained it. But I did speak of it.

Q And did you tell him that, for example, a one-half inch -- I'm sorry, it would be one-half inch of angle for

every eight feet?

A No. I said one-eighth of a degree for each eight feet.

Q Now, Captain, will you look at this plan of the Concordia Viking which is Defendant's Exhibit C in evidence and tell me, if you will, Captain, whether that plan indicates the camber of the weather deck on that ship?

A I don't see it on this plan because it isn't the type of profile plan that would show it. I need a cross section of the ship in the middle showing both sides.

Q Is there anything on that plan which, based on your experience and your knowledge of ships, would permit you to calculate or estimate the camber of the weather deck on that ship?

A No. I say that it is a general feature of the camber.

Q I am only asking you about this plan, Captain. You can answer that yes or no, either you can or cannot calculate it from that plan.

A Nothing on this plan.

Q While you have the plan in front of you, Captain, what is the beam on that ship?

A The beam?

Q Yes.

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(Pause)

Q Don't bother with the calculation. Will you assume the beam is 68 feet on this?

A Yes. There is a cross section, also. I see a little insert which shows the camber but not the exact degree. It shows the camber.

Q Can you from that little insert determine the amount of camber of this ship, or from any other feature of this ship?

A Not unless I have a protractor. I would give my estimate that in no case would it be more --

THE COURT: Please, let's proceed.

MR. KAIN: I just asked him if he could calculate it.

MR. FRIEDMAN: The 68 foot beam was in what location of the ship?

MR. KAIN: That is the beam of the ship.

MR. FRIEDMAN: Is beam the width or the length?

MR. KAIN: Beam is the width.

MR. FRIEDMAN: Are you representing that this ship is the same from the beginning to end?

MR. KAIN: Captain Ash knows what I mean by the beam. I don't have to explain it to Mr. Friedman.

THE COURT: I thought beam was a well known term.

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MR. FRIEDMAN: I know that the front end of a ship and the back end of the ship is somewhat narrower than the middle of the ship.

THE COURT: Which doesn't help us with regard to beam.

Q Captain, if you are asked what the beam of a ship is you have an answer, don't you?

A Yes.

Q It doesn't depend on whether the bow is narrow or the stern is wider, does it?

A It is the widest width.

Q Will you assume with me, Captain, that the beam on this ship is 68 feet, or approximately that?

When you talk about camber, this is like the crown of a road, isn't it? From the center line of a ship there is a certain amount of degrees or slope towards the bulwark so the scuppers on either side can drain off water?

A Yes, sir.

Q And that can be calculated, can it not be, Captain?

A Oh, yes, it can.

Q Do you have to use logarithms to calculate the number of degrees?

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A You can measure if it is shown completely. You also need to know more about the plan itself. This is only a general plan. A specific cross section would give it.

Q Now, Captain, we are discussing here the stowage and securing and the handling of deck cargo generally, are we not?

A Yes.

Q And initially, Captain, can I ask you, is there more than one proper way to secure cargo aboard ship?

A There are many ways that will result in a safe stowage.

Q You haven't heard and you haven't been told the method in which the cargo of containers at number five hatch was lashed on deck when these containers were taken on board in the Persian Gulf, have you?

A Yes, I have.

Q And where did you get that information?

A From the deposition, from the reports that I read and from the testimony that I was asked to assume, that it was a package lashing.

Q Well, will you assume with me, Captain, unless you have some way of pointing out to me where it is, that there is no precise testimony as to exactly how these containers were loaded and lashed in the Persian Gulf, in Damman,

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Saudi Arabia; if you have some precise information on that will you tell me where you got it?

MR. FRIEDMAN: I object. He said he got it from reading the deposition.

THE COURT: I don't think this is helpful. He has been asked to assume, because the plaintiff here argues that the evidence shows certain facts. Now, it is a jury question as to whether it does. You may have a different position and you can ask him to assume a different set of facts, as long as it is reasonable.

Q Will you tell me, Captain, with respect to the containers loaded on the port side, the offshore side of the Concordia Viking, what is your assumption or your understanding as to how they were loaded when they were put on in the Persian Gulf; will you tell me what you understand was the method which they were loaded?

A I was given to understand, and I assume they were loaded in a fore and aft manner parallel with the hatch with as much space left between the hatch coaming and as much space between the second one as the bulwark as would allow

Q And were you given to understand there were eight containers?

A On the port side.

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Q And how were you given to understand or what is your understanding as to how these containers were lashed on deck for the ocean crossing?

A They were lashed down with wires over the top to the deck pad eyes and secured, tightened with turn buckles.

Q Is it your understanding that the only method in which these containers were secured is by wire lashings passing over the top of these; is that what you mean? Over the top of these containers?

A No. Could have been from the corners down.

Q I don't want to know what could have been. I want to know, Captain, what you can tell me was the method in which these containers were loaded.

A My understanding that the wires went completely over the top, tied them down, not only athwartships but fore and aft.

Q Is that what you mean when you referred to a package lashing?

A Yes.

Q Did you understand they were secured in any other manner other than by these wire lashings which you have described?

A With the tightening devices, turn buckles.

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Q Well, Captain, will you assume with me --

THE COURT: Can I interrupt you?

Does the jury know what a turn buckle is?

(Jury indicates in affirmative)

THE COURT: They do.

We will take our recess now.

(Recess)

(In open court - jury present)

W I L L I A M C H E S T E R A S H, resumed.

CROSS EXAMINATION CONTINUED

BY MR. KAIN:

Q Captain Ash, will you look at Plaintiff's Exhibit 5 in evidence, and I refer specifically to the stowage depicted on the bottom of this exhibit with the arrow pointing to it.

A Yes.

Q Does that depiction or that diagram, is that the way in which you say these containers should have been stowed aboard the Concordia Viking?

A If there were two high, that is the way they should have been secured.

Q And am I correct that that diagram shows no lashings from the two upper containers; is that correct?

A Oh, yes, it does. It is made fast to the bottom of the upper container.

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Q Are there lashing wires shown on that diagram for the upper containers?

A Yes.

C Where is that, Captain?

A You see, it goes above -- you see this? It goes above and it takes in the bottom of the upper container.

In other words, it is tied down on top of the fittings.

C In other words, it goes through the corner castings for the upper containers?

A Yes.

Q May I ask you this, Captain: you say that there should have been stacking devices or shoes between the upper and lower containers?

A And also on the bottom.

Q Also on the bottom?

A Deck fittings.

Q And were you present in court, Captain, when the testimony of the plaintiff was that the lashing wire which he found on at least one or more of the containers, pieces of lashing wire were approximately the diameter of his thumb?

A Yes.

Q And it was conceded, I believe, Captain, or will you assume that that estimate had approximately three-quarters

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of an inch in diameter?

A Yes.

Q Is it your testimony, Captain, that with stacking plates and devices between these upper and lower containers, is there room for lashing wires to go through the corner castings?

A There is room because there are two holes that go through. But also at the end of your lashing wire of the type with the turn buckle or the tensioning gear there is a hook that fits in. A hook fits in to hold it down.

Q Is there room for a three-quarter inch wire, assuming a casting which has been testified to, an opening on either side at the corner and one on the top or the bottom, depending on the position of the co ainer, is there room for a three-quarter inch wire to pass through that corner casting?

A Yes, if there is nothing else there.

Q With a stacking device or a shoe in place?

A If a stacking device, a shoe in place doesn't call for just a plain wire. It calls for a unit with a tensioning device of either a turn buckle or a hook or clamp that fits in there. The wire doesn't go all the way through it.

Q Well, Captain, you made some mention of relatively

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easy procedure it was to knock off these lashings for each container as it was hoisted off the ship; is that right?

A Just before it is hoisted, that is right.

Q And are you assuming, Captain, that the lashings being knocked off -- first of all, I will withdraw that question.

Do you know what Peck & Hale gear is, Captain?

A Yes, that is what this is, Peck & Hale gear.

Q Peck & Hale gear, those are predetermined sized lashings, are they not?

A Yes, they are.

THE COURT: How do you spell this term?

THE WITNESS: Capital P-e-c-k and capital H-a-l-e. It is one of the most outstanding manufacturers of securing gear, not only for containers.

THE COURT: It is pre what?

THE WITNESS: Premeasured. The units are already cut to fit and they have the adjustments in that you can tighten or slack off or let go. These are shown in the middle of the drawing.

Q Captain, have you ever sailed on a container ship?

A I haven't sailed on them, I have worked on them.

Q In what capacity? First of all, let me phrase another question before you answer that.

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A container ship, is it not, Captain, it is a ship devoted exclusively to the carriage of containers; is that correct?

A No, that is not correct. There are combination ships. The Grace Line has ships with half containers and half --

Q Captain, will you assume for the purposes of my question, when I say a container ship I am referring to a ship that carries no other cargo but containerized cargo? Are there such ships, Captain?

A Many.

Q And have you sailed on a ship that carried no other cargo but containers?

A I have not sailed on it. I have worked in it as the port relief officer in charge of it.

Q Now,on a container ship -- well, first of all, let me withdraw that question.

We had a lot of talk here, Captain, about I.S.O. containers. And it is true, is it not, there is no regulation size for a container, that a container has to be; isn't that so?

A Well, I disagree with that. There have been odd sized containers made by individuals. There are some companies that had 35 foot containers and had to actually modify the

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ship with an extra bulkhead. Otherwise, they couldn't carry them. But normally and over the years it has been standardized more and more and more. You have your 20 foot, you got your 40 footers and they are all eight by eight.

We used to have conex boxes containers eight by eight by eight for years and they still use them.

Q Captain, are you familiar with the Sealand operation in Port Newark?

A I worked on some of the ships as a port relief mate. In the middle fifties I worked on every one of them. Six of them.

Q Do Sealand ship carry 35 foot containers?

A They did in the beginning. Some did.

Q Is it your testimony they don't carry 35 foot containers now?

A I didn't say that. I said they have had to modify some ships to carry 35 foot containers.

Q Based on your experience, Captain, if I operate a ship in the container trade, is there an advantage -- say I am running ships between Puerto Rico and the Port of New York for the Continental United States. Is there an advantage for me to have, for example a 35 foot container that doesn't fit anybody elses ship so they have to go both ways aboard my ship?

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A It is a disadvantage.

Q It is a disadvantage?

A Yes.

Q Well, were you familiar with Grace Lines container operations at any time?

A Yes. They only had two ships to start with and they were only seventeen footers. They were designed for the trade between New York and Venezuela, because of the truck chassis down there and they had seventeen footers that wouldn't fit anywhere else.

Q Well, what I am getting at, Captain, to shorten this up, there is no requirement and you don't mean to imply that there is some regulation or some treaty convention or something of that sort that requires all containers be 20 feet or 40 feet, do you?

A Yes, I do.

Q You do?

A I have quoted the standardization of the I.S.O. because of the necessity of these containers sometimes going on a chassis and go through the country, sometimes going on a railroad, sometimes going on a ship. And if they aren't standard there would be nothing but chaos. That is the program that started --

Q That is not what I asked you, Captain. I asked

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you do you know of any regulation or law, statute, if you will, that requires all containers to be 20 foot and 40 foot?

MR. FRIEDMAN: I object on the grounds of irrelevancy. There is no issue in this case and no contention by either side other than that these were 20 foot containers. The captain so testified.

THE COURT: I don't understand what the issue is.

MR. KAIN: It is simply this, your Honor: I am trying to the best of my ability to dispel this constant reference to I.S.O. and get from the captain a concession, if he is willing to give it to me, that there is no requirement that containers be standard; that is, it may be a custom and practice if he wants to say so, but there is no legal or statutory requirement that these containers all be 20 and 40 foot containers.

MR. FRIEDMAN: I have no objection to a line of such questions relating to the stacking devices which are at issue in this case. But the length of the containers, 20, 17, 35 or 40, is not an issue in this case.

MR. KAIN: I don't contend it is.

May I rephrase the question?

THE COURT: I get your point, Mr. Kain, but let's not labor the length. Obviously there are some ship-

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owners who carry 35 foot containers, are there not?

THE WITNESS: Yes, there are.

THE COURT: There are or were some that carried seventeen foot containers?

THE WITNESS: Yes, your Honor.

THE COURT: Some that carry eight foot containers?

THE WITNESS: Yes.

THE COURT: And different lengths?

THE WITNESS: Yes.

THE COURT: So is there any contention that as far as length there is some convention or requirement that there be just 20 foot or 40 foot lenth containers?

THE WITNESS: Yes, your Honor. That is the convention that they are all aspiring to achieve.

THE COURT: But there is not now any obligation on the part of a shipowner to only carry 20 or 40 foot containers? Is there any legal obligation?

THE WITNESS: No legal obligation that I know of.

THE COURT: That is enough on length. Let's go.

Q Let's go back, Captain, to these container ships, and you will bear in mind that I am talking about a ship that carriers nothing but containers. On a container ship carrying only containers, the containers loaded aboard that ship are all loaded in a predetermined position, are they not?

A Well --

Q They go into precise positions?

A Yes.

Q And to facilitate the loading and handling and discharging of these containers they are fitted with deck fittings where these containers are dropped at predetermined positions for each stow; is that correct?

A Correct.

Q And they have stacking plates or shoes between these containers; is that not so?

A Yes, indeed.

Q And they sometimes go three or more containers high; is that not so?

A Usually the maximum is three, sometimes four.

Q And they also have bridges between the stows locking them, its lateral movement; is that so?

A Very rare. I have seldom seen them.

Q Do they have lashings going from the top stem to the decks?

A Yes, very important.

Q Do they have lashings going underneath them?

A It varies. Some of them go all the way and some have intermediate lashings.

Q And since these containers on a container ship go

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in predetermined positions with predetermined fittings designed to carry this particular type of container, they have Peck & Hale and other ready-made gear that you just snap into place for these predetermined positions; is that not so?

A That is correct.

Q Now, let's go back to a dry cargo ship like the Concordia Viking. Is a ship like the Concordia Viking designed to carry containers exclusively?

A No.

Q And would you expect that a ship like the Concordia Viking could handle containers of various sizes under certain circumstances? In other words, if not on this voyage might on some other voyage the Concordia Viking have carried a 40 foot empty container on deck?

A Apt to pick them up anywhere.

Q And you sailed on dry cargo ships, have you not?

A Yes.

Q Have the dry cargo ships on which you have sailed have these same type of predetermined fittings for containers on the decks? I'm referring now to the fittings on the deck between the bottom container and the deck.

A I haven't bee a ship that regularly carried containers or I would have them.

Q Do you know whether the Concordia Viking regularly

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carried containers?

A I don't know. I didn't say that.

Q But on the ships you have been on that did not regularly carry containers there were no such fittings on the deck; is that correct? Dry cargo ships I am referring to.

A That is right. They are portable.

Q And since there are no predetermined positions and since the containers may be of various sizes, is it not true, Captain, that it wouldn't be feasible on a dry cargo ship to use these predetermined Peck & Hale gear?

A I disagree.

Q Well, let me ask you, are the fittings on a dry cargo ship so placed on deck so that they would be predetermined distances from containers which might be carried on deck?

A They can be made portable and usable. There is nothing to preclude it. If I am on a ship that is going to carry some containers every trip, as master I would demand those fittings and use them.

Q You are not answering my question. Listen to my question. I say on the average dry cargo ship that carries containers on occasions, that is not devoted to the carriage of containers, do the deck fittings lend themselves -- when I say deck fittings I mean pad eyes and other fittings on

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deck, staples; you know what that is?

A Yes.

Q You know what a pad eye is?

A Yes.

Q They are both basically the same shape, aren't they?

A Yes.

Q Do those locations on the deck of a dry cargo ship lend themselves to premeasured predetermined lengths of lashings for containers which may be 20 feet, 35 feet, 40 feet?

A There are limitations.

Q Limitations.

A It wouldn't make any difference about the length. If it was only one high, I could secure them, practically fit them to the deck without any fittings. But when I want to stack them two high then I need the proper equipment.

Q Well, Captain, let's take the situation we have here on the Concordia Viking and you looked at a print of this ship and you have seen it during the recess, haven't you?

A Yes.

Q Now, let's take this situation here with respect to the bottom containers on the port side of number five hatch.

In your opinion based on your experience, would it have been a proper method of securing those containers to chock them in between the bulwark and the coaming?

A If they were one high, yes.

Q I am talking just about the bottom containers. Let's assume there were four bottom containers and no top ones.

A I made qualifications yesterday which I will repeat today. I would so dunnage the bottom to offset the camber so that it would be vertical, parallel with the mast in the center of the ship. That would be the first consideration. Then the chocking.

Q But you do, if I understand your answer correctly, concede that it would be a proper method to secure these containers on a dry cargo ship to chock between your hatch coaming and the chock between the containers and your offshore or your port bulwark; isn't that so?

A Yes, with the qualifications I stated.

Q Just a yes or no, Captain.

A I can't give you a specific yes or a specific no. I have to give you a qualified answer.

Q Well, will you qualify it then in the way you would deem necessary?

A I qualify it by the statement that it first must

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be horizontally at right angles with vertical, that it has got to be sitting flat and not on an angle to offset the camber of the ship. This is done by using the proper dunnage; then chocking it, and lashing it is an entire adequate safe and secure job.

Q Let me ask you, Captain, have you in your many years of sea experience sailed on a ship with the same general features as the Concordia Viking?

A Yes.

Q And assuming again a 68 foot beam on this type of ship, as on the Concordia Viking, based on your experience on this type of ship and your knowledge which you had to have as master of this type of ship, what was the camber of similar ships that you sailed on at the deck at number five hatch, approximately?

A It never exceeded two degrees in total for the whole length. It was just enough of a slope that it was obvious and apparent, as it is in this plan.

Q Let's see if we can reduce this a little for the benefit of his Honor and the ladies and gentlemen of the jury. We are talking about an arc of two degrees --

A Maybe three.

Q If you drew a straight line out from the center line of the ship -- that is where you measure the camber from?

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A Yes.

Q From the very center, right down the middle of the ship; if you drew a line out to the port bulwark that was directly -- didn't deviate at all, a straight line. When you got out to the port bulwark what would be the distance from the end of that projected line down to the end of the deck? Instead of degrees how many inches?

A It would be in the range of two inches, at most if it was a 68 foot beam ship. I have commanded victory ships of the same beam and that was it.

Q Let me be sure I understand you. You say that the outboard deck would have been two inches less than the center line?

A From the horizontal. That would be of extreme right angles to the perpendicular.

Q Now, are you telling us that this distance, this camber which you say is a two inch difference, that that requires, that two inches requires dunnage to make it completely flat?

A Yes. Under your container -- I'm not saying you are going to make the whole deck flat.

Q I am only speaking with reference to the container.

A On the container, you build it up with dunnage where it sits so that it is sitting in a vertical position

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at right angle to the perpendicular so that it will not have a tendency to be more one way than the other.

Q And that is the two inches you are talking about; is that right?

A Yes.

Q Now, Captain, dunnage by definition is -- well, first of all, it is usually hard wood lumber?

A Sir?

Q Dunnage is usually hard wood, isn't it?

A No. It is the cheapest wood you can buy. Sometimes you get hard wood.

Q Is it usually hard wood?

A No, it is not usually hard wood.

Q Is it usually green lumber?

A Yes. It is rough cut lumber of a common variety.

Q And is dunnage also random width, random lengths but generally one inch in diameter?

A That is the most common type of dunnage.

Q I'm not talking about dimensional lumber but that is the usual definition of dunnage; is that right?

A That's right.

Q If I understand your testimony correctly, you would say if you had a camber of two inches on the port side the outboard portion should be built up so that in effect it is

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left completely across; is that right?

A If you are asking me how to properly dunnage for a 20 foot container, I've got to have drainage underneath it so water won't accumulate there and can run off. I have to lay my dunnage in slats both fore and aft and athwartships and build it up on the offshore side away from the hatch so that when I put something on it, it is going to sit perfectly flat. This is the proper way of dunning your deck load.

Q Is drainage under a container a problem, Captain?

A Sometimes yes, sometimes no.

Q Isn't it a fair statement, Captain, to say that a 20 foot container, such as we have described here has four points of contact, four corner castings that project below the bottom of the container?

A Yes, as a rule.

Q And if you were dunnaging under this container, Captain, you would only have to strip dunnage under those corner castings, you wouldn't have to dunnage under the middle of the container, would you?

A It depends on the container. If it was the regularly accepted I.S.O. container, I'm sure I wouldn't have to. If it was a homemade rig that somebody made in their own warehouse, then it might be a different situation.

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I don't know. I'm talking about a standard container.

Q Well, a standard container with these four corner castings that project below the bottom of the container, you don't have to dunnage when you are dunnaging under anything but the corner castings, do you?

A You have to dunnage sufficiently along the edges.

Q Now, Captain, is there a standard size turn buckle usually used in connection with lashing deck cargo of this type?

A It is coordinated with the thickness, the diameter of the wire you are using. If you are only using a half inch thickness wire, the diameter, you will use a smaller turn buckle than if it is three-quarter inch or a heavier wire. The size of it is determined by the weight and the heaviness of the wire. You are not going to use the small rather comparatively weak turn buckle on a big heavy wire.

By the same token there is no point in using a big heavy turn buckle on a smaller wire. The two go together.

Also important is the length of the yoke.

Q Well, Captain, will you assume with me that the testimony in this case is that the wire lashings -- the testimony so far is that the wire lashings were approximately

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three-quarter inch wire. Would you tell me what is meant by three-quarter inch wire? How is wire measured?

A By the diameter.

Q And assuming, Captain, that this is IPS wire -- you know what I mean by IPS wire, don't you, Captain?

A ITS?

Q IP as in Peter.

A Plow steel. Plow steel.

Q Improved plow steel wire; right, Captain?

A Yes.

Q Assuming three-quarter inch plow steel wire, what is the safe working load of three-quarter inch plow steel wire?

A Offhand I would say ten tons. I could look it up.

Q Is there a rule of thumb, Captain, for determining the safe working load of improved plow steel wire?

A Oh, you could calculate it very easily. Diameter square --

Q Times what?

A Diameter square divided by pie -- I haven't used the formula for so many years. I just look at the tables. I'm satisfied with the manufacturer's statistics but I would say a three-quarter inch wire is an exceptionally safe wire

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to use on a two ton load.

Q Is it eight times the diameter square, Captain? Is that the rule of thumb?

A I think so.

Q If my calculations are correct, does that mean that the safe working load of three-quarter inch wire is four and a half tons, about?

A 5.6, something thereabouts.

Q Now, what is the difference, Captain, between --

MR. FRIEDMAN: Excuse me, Mr. Kain. I want to do the arithmetic.

MR. KAIN: As I make it is is 72/16. Divide that.

MR. FRIEDMAN: Then multiply by 8 I thought you said.

MR. KAIN: I don't know why I'm bothering you with this. If you multiply it by eight you get 72.

MR. FRIEDMAN: Okay.

Q What is the difference, Captain, between the safe working load and the breaking strength? What does the term mean in connection with wire?

A When wire is manufactured to specific standards, and improved plow steel wire of either six strands of nineteen wires each, it is tested at a vertical strain of weights, and when it breaks, that number of weight is known as the

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breaking strain.

Now, if you have determined that the breaking strain is eighteen tons, that is what it took to break that wire, then the safe working load is one-fifth of that. Five into eighteen tons would give you the safe working load.

Q I don't mean to cut you short, but you could have answered this question by telling us that it was one-fifth or five times the safe working load.

Now, will you assume with me, Captain, that the turn buckles used aboard the Concordia Viking for this voyage were 1 x 18 turn buckles. Will you assume that?

A Yes.

Q And will you tell me what the meaning of the expression -- what is a 1 x 18 turn buckle?

A The yoke in the center is eighteen inches long and the screw that fits into it is one inch in diameter.

Q When you say the yoke, do you mean the travel?

A Yes. It can be tubular, it can be open. One has a left-hand thread --

Q Just on the turn buckle are you saying that the 1 x 18, the eighteen comes from the housing around the threads of the turn buckle or are you talking about the travel?

A I am talking about the center of the turn buckle which I call the yoke. The amount of travel would be eighteen

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inches on each side but you wouldn't have enough threads left. It would stretch out to 36 inches.

Q Now, let me ask you, Captain, you never worked as a stevedore, have you?

A I have worked in the hold as a seaman on ships where we did some cargo work. That is all I can tell you.

Q Will you answer my question, Captain? Have you ever worked as a contract stevedore or the employee of a contract stevedore?

A No.

Q Can you tell me, Captain, do you have an opinion, assuming three-quarter inch wire lashings affixed to a 1 x 18 turn buckle, and assuming one man taking up the turn buckle, do you have any idea of how much force could be exerted on that lashing by turning this turn buckle say with a Marlon Spike or some other instrument, one man by hand? Do you have any idea?

A Not approximately. I know that he couldn't break the wire with it. He might tear out a fitting depending on how heavy it was up.

Q In any event, it is a very considerable amount of force that you can exert with this turn buckle?

A Yes.

Q That is the reason for it, isn't it so, so he can

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take these things up really taut, tight?

A Yes. This is what you want.

Q Now, assuming, Captain, a lashing running from a corner casting -- let's take an upper container, a lashing running from a corner casting where the three-quarter inch wire goes through the corner casting, comes down, two ends are brought down and you understand what I am doing, the loop through the corner casting (indicating)?

A Yes.

Q The two ends secured to a turn buckle by means of a wire clip -- do you know what a wire clip is, Captain?

A Yes.

Q Would you tell me what a wire clip is, Captain?

A Offhand, if there is only one wire clip on each side --

Q Please tell me what a wire clip is, Captain, without trying to anticipate me.

A A wire clip or wire clamp is a device that has a U bolt which fits into a fitting which is grooved in the inside to fit into the wire and it has two nuts on it and you set those nuts up tight and you can hold the two pieces of wire together.

Q And is that an acceptable method for securing a lashing wire to a turn buckle, in your opinion?

A It is a suitable method if you use enough clamps. There is a minimum number of clamps, depending on the thickness of the wire, recommended by the wire manufacturer. And using wire clamps on the ends where you make them into your turn buckle would call for more than one on each side.

Q Is it an appropriate method of securing a turn buckle to have it in effect at the lower end of the lashing so that one end of the turn buckle is into the deck fitting, the staple of the pad eye and the other end of the wire?

A That is one way of doing it. There are better ways but that is one way.

Q Is there any practice with respect to checking wire lashes during transatlantic crossings?

A Yes. That is done every day under the supervision of the officer in charge. Sometimes he does it himself, sometimes he sends the boatswain or an experienced ablebodied seaman to check it.

Q When you say does it himself, you mean he may inpsect it himself or are you saying that it is the obligation of the ship's officer to physically do any work that may be required?

A I didn't say that. I say he walks along with a bar and gives it a smack. If there is any slack, he may take a couple of turns. If there is no slack he just walks

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on to the next one.

Q And that is the customary routine aboard ship when it is at sea?

A Yes.

Q And if necessary, to tighten a lashing you take up on the turn buckle; isn't that so?

A That is correct.

Q And you as master of the ships you sailed on, if you received notice of heavy weather from your weather station, the ship's radio, you would normally have your carpenter or maybe yourself check these and make sure you had these all tight and secure?

A I would trust my chief mate for that.

Q Now, Captain, you made some mention of the fact, and correct me if I am wrong, you said that in your opinion in picking up one of these containers here -- and assume, if you will, at Hoboken, pier B, in discharging these containers they all should be lashed until just before they were picked up, at which time the crew should take off the lashings only for that individual container; is that right?

A I didn't say completely. I said sufficiently to hold it taut so that it can be quickly released.

THE COURT: May I hear the question and answer?

(Question and answer read)

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Q Well, what portion should be taken off that would still leave it adequately, the lashings as you conceived they were aboard the ship at the time of this accident? what portion would you take off?

A Maybe 75 percent. Depends how it is lashed. If I am going to lash it there will be two lashings left for the last. And the turn buckle, the release on the turn buckle, whether it was a pelican hook or a shackle that can be opened to let it go instantly.

Q Just a minute, Captain. Maybe I misunderstood you. I thought you told me that your assumption in this case was that this block of eight containers was lashed with lashings going from the top down to the deck and entirely over both lengthwise and athwartships?

A Yes.

Q And assuming, if I can use the expression, assuming the type of stowage which you have assumed we had or you were asked to assume we had, what lashings would you recommend could be taken off?

A You have no alternative --

MR. FRIEDMAN: Objection. He explained in the testimony on direct what should have been done. Now Mr. Kain is asking him to assume what was done, how you get back to Brooklyn when you are in the Bronx. He explained that they

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should have been lashed in a different way and they should have been released in a different way than they were.

Now, Mr. Kain is asking him to accept and assume what he has described, as was not a proper way to begin with, and then apply the proper way of releasing the improperly applied onloaded lashings. He is mixing apples and oranges.

MR. KAIN: If your Honor please, I was under the impression that one of the things asked Captain Ash on direct examination was were the ship's crew in error in removing these lashings before some considerable time or some portion of time before they were discharged from the ship. I understand, and my recollection is, that Captain Ash gave him an affirmative answer.

Now I am asking Captain Ash on the stowage which he has assumed was aboard that ship, because he just told me that only sufficient lashings had to be left to have it adequately secured, I am attempting to elicit from this witness what lashings had to be left of the stowage that he was asked to assume he had on the ship. I think it is an entirely proper question.

THE COURT: I think it is an okay question if he can answer. In other words, if he can answer about what he thinks would be proper under the circumstances, okay. If he believes nothing would be proper under the circumstances

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and that there was nothing to do but do nothing, I guess that is all he can answer.

MR. KAIN: All right.

Q With those qualifications, Captain, is there any proper way you could have done this or can you tell me what should have been done?

A I have tried to make myself clear that the way they were lashed there was no alternative except to let them all go if you want to discharge one. This is what I have been trying to say, that they weren't lashed in a manner where the bottom of each one was tied down, as was introduced in this exhibit; that it was impossible, the way the description was given to me of their lashing, to take out one unless you let them all go.

Q All right, Captain. Now, let's assume that this ship on the day of this accident had whatever type of lashing of these containers or securing of these containers you yourself deemed adequate. Anything you say is an adequate type of lashing. Assume that. What then should be done? Should the ship's crew unlash these containers or a certain portion of these containers as each one is discharged?

A I repeat, I can see no alternative way of releasing the lashings when they are all tied down as a package.

THE COURT: I don't think you understood Mr. Kain's

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question. He now wants you to return to the situation that you recommend; that is, the way it would be in Exhibit 5. Assume that that is done for the purpose of argument.

THE WITNESS: Yes.

THE COURT: And then he is asking you based on that assumption exactly what would the ship's crew do to prepare or loosen or whatever they should do to get it ready for the longshoremen to do their job.

Am I right?

MR. KAIN: Yes, your Honor, but maybe I can make it a little easier so the captain will understand me.

Q Captain, let's look at Plaintiff's Exhibit 5 in evidence. Let's assume we have this type of lashing which I believe you indicated was the ideal type or what you would consider ideal.

A Yes, sir.

Q Now, can you tell me, looking at that diagram --

MR. FRIEDMAN: Excuse me, your Honor, I don't believe he testified it was the ideal, he testified it was the proper way.

MR. KAIN: I just asked him and he said it was.

THE COURT: Mr. Friedman is right as to what he testified to before.

Q In your opinion, that is a proper lashing; is

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that not so?

A Yes.

Q Now, looking at that document would you tell me what the crew should remove from that type of a stow or lashing, stowage as they were discharged and at what point the crew should remove them?

A Well, if you will see the center of this exhibit, there are two types of lash assemblies. With releasing gear. One with the tensioner and one with the turn buckle. With hooks on the end so that a matter of seconds the lashing could be released.

And so I repeat, the only safe way is to release one at a time so that the rest of them on their stacking devices and deck devices will remain secure while one is in motion.

THE COURT: I tell you, it has never been clear to me, and I wish we had a big slide of this or something to show to the jury, but I don't really understand how these cables or wires are affixed to the places they are affixed to. Are they run through and looped around or are they done with hooks?

THE WITNESS: Done with hooks just as that center drawing shows. You have two options --

THE COURT: What center drawing are you talking about

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MR. KAIN: The one with the arrow, I believe.

THE WITNESS: These (indicating). Now, this is that lashing that you see there.

THE COURT: Let's mark the center drawing with a capital A, shall we?

THE WITNESS: Now, if one of these -- this lashing here, either one. Usually they are in pairs of the same kind. Because this is what gets tightened up from the daily inspections, they become loose. This tensioner is a hand bar that you pull up and down. It works hydraulically.

You notice they both have fittings on the end and fittings on the bottom. They fit into the deck fittings and they fit into the holes on the bottom of the top container.

Now, it is a matter of seconds to let this go, either one of these two types, before you take off these.

THE COURT: What do you do, you loosen the turn buckle or you loosen the tensioner and then you knock out the hook?

THE WITNESS: The hook will lift right out.

THE COURT: So you just stand there -- whoever is supposed to let them go, he would stand there and loosen the turn buckle or the tensioner and it would fly out?

THE WITNESS: Lift right off. It never exceeds

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the whole unit more than the diagonal of the eight foot container.

THE COURT: All right. And there would be how many of these for any single container, four of them or what?

THE WITNESS: Four of them on a single container and four of them on the double container.

THE COURT: In other words, we are just taking -- you are only loosening one container at a time; is that right?

THE WITNESS: That's right.

THE COURT: So there would be four of these to be loosened, two at each end?

THE WITNESS: Yes.

THE COURT: Maybe the jury doesn't need this but I think, Mr. Kain, it might help to have this passed because I didn't focus myself on that center picture so I didn't understand the testimony too well.

MR. FRIEDMAN: May the record show your Honor is referring to Exhibit 5 and the center picture is the big center picture.

MR. KAIN: Before we show it to the jury, may I ask the captain just one or two more questions which I think may be of interest as the jury is looking at it?

THE COURT: Yes.

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Q Captain, how long is it since you commanded a ship or were a mate aboard a ship, a dry cargo ship which called at the port of New York?

A 1968 -- in the port of New York?

Q Yes. When I say port of New York, I mean Hoboken, Port Newark, Brooklyn, North River, East River.

A Probably 1967.

Q Isn't it true, Captain, that under no conditions would the longshoremen, International Longshoremen's Association, their union, permit any ship's crew to handle any lashings of any type or any other fittings while the longshoremen are discharging cargo? Isn't that so?

A It depends on whose obligation it is. Normally you do not find a crew working with the longshoremen.

THE COURT: Are you finished with your answer?

THE WITNESS: Yes.

THE COURT: I'd like the question and answer read, please.

(Question and answer read)

Q Isn't it true, Captain, that under the union regulations you not only normally don't find them but the union doesn't permit the crew to assist the longshoremen in any way during a discharge; isn't that so?

A This depends who is supposed to remove lashings. If the stevedores are being paid to remove the lashings, they

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do it. If they are not being paid for it, they won't do it.

Q Isn't it true that the union doesn't permit the crew to participate in the discharge in any way at all, whether we are talking about lashings, whether we are talking about operating winches, whether we are talking about positioning booms, whether we are talking about affixing tag lines, bridles or anything else?

MR. FRIEDMAN: I object to that omnibus question about tag lines or anything else. We are dealing with lashings.

THE COURT: Overruled.

MR. FRIEDMAN: Which part of the question should he answer?

THE COURT: The whole question.

If you know.

A I have seen no problem of that type when I worked in New York on the container ships.

THE COURT: You are being asked. If you don't know say you don't know. You are being asked something about what the union regulations provide.

Is that right, Mr. Kain?

MR. KAIN: That's correct.

THE COURT: You may not know it but that is the question. Do you know what they provide in this regard?

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THE WITNESS: I know it is not customary --

THE COURT: That isn't the question. The question is whether you know what the union regulations provide as to the participation or nonparticipation by crewmen in the lashing, and so forth, along with longshoremen.

THE WITNESS: The crew in removing lashings are not working with the longshoremen. They are just making the cargo available to the longshoremen.

THE COURT: You are wasting our time. The question is simply do you know what the regulations provide? Apparently you don't and let's go on.

Were you going to pass the picture to the jury?

MR. KAIN: I'm sorry, sir.

THE COURT: As I understand it, Captain, those two things that are crossed are two different types of lashings; right?

THE WITNESS: That is correct, sir.

THE COURT: It is not intended to represent a single lashing; right?

THE WITNESS: That is right.

THE COURT: And one has two hooks and one has a hook and a turn buckle?

THE WITNESS: That is right.

THE COURT: I think that might help.

MR. KAIN: I pass it to the jury.

(Pause)

THE COURT: You may continue, Mr. Kain, please.

Q Now, Captain, the Peck & Hale gear which you have in that description there, will you assume was not aboard the Concordia Viking. Will you assume that insofar as the lashings were concerned, and I am referring only to lashings, not other possible --

THE COURT: I didn't hear the beginning of the question.

Can you read, Mr.Reporter, the question.

(Question read)

Q -- means of securing their cargo; that these containers were secured by means of wire, wire clips and turn buckles, and you told me just a minute ago insofar as lashings were concerned that this was an acceptable method, did you not?

A Yes.

Q An acceptable method of securing containers, using this material. I'm not talking about how they were rigged.

A Yes.

Q Wire clips, wire and turn buckles.

A Yes.

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Q Now, this diagram you have shown us in Defendant's Exhibit 5 -- I'm sorry, Plaintiff's Exhibit 5 in evidence. Assuming that type of gear, turn buckles, wire clips, and wire, three-quarter inch IPS wire, you couldn't free this, could you, with stacking plates in place if they passed through those corner castings on the upper containers?

A They don't pass through. They have hooks on the end.

Q I said would you assume that on the Concordia Viking we didn't have hooks on the ends, that we used wire going through the casting, wire clips to secure it to the turn buckles which, in turn, was secured on deck to pad eyes and staples. Will you assume that?

A Yes.

Q I understood you to say that that was an acceptable method of securing these containers; is that not so?

A I said --

Q Insofar as the lashing is concerned.

A Yes.

Q And I say assuming that type of equipment, and I direct your attention to this stow here that you have the arrow to; if you had this type of equipment, using it to lash in the manner described and going to those lower containers,

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you wouldn't be able to move the wire around with shoes and stacking plates in place, would you?

A You are asking me to assume something impossible. I can't give you an answer to that.

Q You can give me an answer to this if you will listen to me, Captain: if the only lashing gear used for lashing, the only way wire lashings were used on this ship, on this voyage, was to pass a piece of wire through the corner casting, both ends coming out. So you will understand me, the loop goes through the corner casting.

A I understand.

Q And fixed to the turn buckle with wire clips.

A I understand that.

Q And the turn buckle in turn secured in a pad eye or a staple on deck.

Now, my question is: if you had four containers, two above the other, using this type of lashing wire and stacking plates in between the upper and lower containers, you couldn't pass the wire through the castings, could you?

A I would assume that you could not because --

Q You see, you can answer.

A -- it is improper.

Q So assuming that type of equipment which you told me was proper, it wouldn't be feasible to stow it in this

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fashion, would it?

MR. FRIEDMAN: Answer the question.

A It wouldn't be feasible to discharge it. For an ocean crossing it would be feasible. For discharging it you have to take the wire out.

Q All right, Captain, just for a minute.

MR. FRIEDMAN: Wait a minute, please.

MR. KAIN: I thought he answered me.

MR. FRIEDMAN: He said wait a minute and it was obvious he was in the midst of an answer or else he wouldn't have said, "Wait a minute."

MR. KAIN: I apologize.

A In securing these boxes with wire it isn't necessary to go through it. You can put a shackle there and then when you loosen the turn buckle all you have to do is open the shackle. There are so many ways that you could do it without interfering. But the way you have described it is an impossible way.

Q Let me explore what you just said. Are you telling me that you could put a shackle through these corner castings instead of passing the wire through?

A Yes, it could be done.

Q With a plate in place, a stacking plate in place?

A No, not with a stacking plate.

Q That is what we are talking about here. You can't pass a shackel through it and you can't put a wire through it, can you?

A But you can put a hook there.

THE COURT: When are we going to have revealed to us a picture of a casting and a picture of a stacking plate?

I always feel apologetic because I feel the jury may have superior imagination to me but at least I don't have the faintest idea of what one looks like so I don't really get the point of what you are talking about now. Are you asking whether it would be impossible to have this kind of loop and at the same time have a stacking plate, or loosen it or tighten it or something? Believe me, I can't understand it.

MR. KAIN: I understood the captain to say this was a preferred type of stowage and I am trying to establish with the captain that with the gear we use for lashing, the wire, the wire clips and the turn buckles, there was no way that this type of stowage, which he says is ideal or good, could have been employed by us even had we wanted to. That is all I'm trying to elicit.

THE COURT: I just have to tell you, Mr. Kain, that that doesn't -- I like to understand, if I have a bit

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of a physical picture of things and I really don't. You, of course, are so familiar with it. Is there a way right now for you to show us what a casting looks like, what a stacking plate looks like and the relation of the two things? If there would be, it would be very nice.

MR. KAIN: If your Honor will permit me to do so, I believe I can have both a corner casting -- I'm only talking about demonstrative evidence, there is no way I can get you the particular casting. I will see if I can have a corner casting and a stacking plate over the luncheon recess. Other than to ask the captain these questions, I don't know how to meet his contention.

THE COURT: No problem about the questions. We just want to all understand what everybody's evidence is.

MR. KAIN: If your Honor will permit me to do so I will see if I can obtain this over the luncheon recess.

THE COURT: Although we don't have the demonstrative evidence, I do want to know where we are at. Maybe we could just go back over it. Is there a bit of the testimony you can go back over?

(Pause)

THE COURT: Show the pictures to Mr. Friedman.

(Pause)

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MR. FRIEDMAN: I don't see these photographs deal with what your H nor has taken up.

THE COURT: Let's have them marked for identification and let's see what we can do.

MR. KAIN: One of them clearly --

THE COURT: Please, let's have them marked for identification.

(Defendant's Exhibit D, E and F marked for identification.)

xxx

THE COURT: Are you offering either or all of those, Mr. Kain?

MR. KAIN: I intend to offer them on my case, if your Honor please, with the possible exception of D for identification.

THE COURT: You are offering E and F?

MR. KAIN: I intend to on my case.

THE COURT: What difference does it make?

MR.KAIN: I'm sorry, it is F for identification. I understand counsel has an objection to it.

THE COURT: You have objected to all of them?

MR. FRIEDMAN: Yes.

THE COURT: Let me see them, please.

(Pause)

THE COURT: Do either of these show a stacking

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plate or a corner casting?

MR. KAIN: Not very close up, your Honor. No stacking plate at all.

THE COURT: Let's defer these then.

Is there a relationship between the corner casting and the stacking plate if they are in place together?

THE WITNESS: Yes, there is.

THE COURT: Now, what is a corner casting? Is a corner casting a square, round, or what?

THE WITNESS: We have it in an exhibit. I can show it to you.

THE COURT: What is that?

THE WITNESS: Number four or five, that hold-tight one.

MR. FRIEDMAN: I have 6 and 7-A. Where is 5?

MR. KAIN: I have 5, I'm sorry (handing).

THE WITNESS: This is the deck plate (indicates).

THE COURT: This is Exhibit 7-A in evidence and there is a thing called "single stacking adaptor." Is that what you call a stacking plate?

THE WITNESS: Yes, the deck plate.

THE COURT: For the deck?

THE WITNESS: Yes.

THE COURT: Is there a stacking plate that goes

between the containers?

THE WITNESS: That is it right there.

THE COURT: That is the double stacking adaptor?

THE WITNESS: Yes.

THE COURT: Let's just put it down.

Now, where is the corner casting?

THE WITNESS: Right next to it. Here are the same things from another publication. This is British, I.S.O., as you see. There is the corner casting, the deck plate and there is the stacking plate.

THE COURT: Now, the jury can see this in a minute, but the corner casting, if the device is in place between the containers, then it fits into that kind of square rectangular opening?

THE WITNESS: Yes, your Honor. This is an integral part of the container. This is fast on the bottom of the container.

THE COURT: On the bottom?

THE WITNESS: Yes. It never moves.

THE COURT: It sits down on a similar device on top of the other container?

THE WITNESS: Yes. So that they can hook onto the container to pick it up.

THE COURT: Just a minute now. If we have this

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corner casting sitting down on the bottom container and we want to use, whatever it is, the stacking plate, we would put the stacking plate -- I am talking about between the containers.

THE WITNESS: Between the deck.

THE COURT: I am not talking about between the deck. Then you would put that stacking plate down into the little rectangular part and then you would sit your --

THE WITNESS: Next box right on top of it.

THE COURT: The hook, if you were having a loop --

THE WITNESS: It would go right in the hole.

THE COURT: It would go through one hole and out the other hole?

THE WITNESS: It would hook onto it.

THE COURT: How does a loop just go through one hole?

THE WITNESS: It is open in the side of that. You can go in one side and come out the other if you want to.

THE COURT: If you had a loop you would go in this end that I am pointing to here and you would come out that side, wouldn't you?

THE WITNESS: Yes.

THE COURT: Maybe the jury could get some benefit out of seeing this.

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MR. FRIEDMAN: May I suggest your Honor mark by 1 and by 2 --

THE COURT: I have already marked them.

I have marked, ladies and gentlemen, the deck stacking plate, I have marked -- I have just put a little red mark "between containers." That is the stacking plate between containers. It has a thing projecting from either side. Then we have the corner casting. You might just pass that around.

MR. FRIEDMAN: Thank you, your Honor.

THE WITNESS: I have a book there of all container ships from all over the world that show them stacked.

(Pause)

THE COURT: It would obviously be easier if we had a slide and an easel and somebody were pointing this out.

MR. KAIN: I will have a corner casting in this afternoon.

THE COURT: All right. We are running a little late for lunch, but we might be able to get a little idea what you were asking about in that last series of questions.

Is it correct -- just go over that again, Mr. Kain, please.

BY MR. KAIN:

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Q Assuming the stowage you show on Plaintiff's Exhibit 5 which you have before you, the one you marked with the arrow as the proper type of stowage. Assuming four containers, two above two with lashings as shown there. If you intend to pass a wire lashing through the corner casting on the upper containers, you can't have a stacking plate in place between the bottom container and the upper container, can you?

A That is correct.

MR. KAIN: That is what I was attempting to show.

THE COURT: In other words, you are saying you cannot have both the stacking plate and a loop going through?

THE WITNESS: That is right.

THE COURT: Thank you very much.

We will adjourn now until 2:15.

(Luncheon recess)

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AFTERNOON SESSION

(In open court - jury present)

MR. KAIN: Before we begin, your Honor, we have a corner casting here, which is a bottom corner casting and it is one I used in another trial I had, if your Honor please. It is upside down at the moment, but this is a bottom corner casting.

THE COURT: Let's have it marked for identification and see if there is objection.

xxx (Defendant's Exhibit G marked for identification.)

MR. KAIN: I think Mr. Friedman and Mr. Leonard would agree with me that all containers are not alike.

THE COURT: Are you offering that into evidence?

MR. KAIN: I thought your Honor was interested in having it as demonstrative evidence what was meant by a corner casting and how they were arranged.

THE COURT: I did ask for it. What will have it, a court's exhibit?

MR. KAIN: May we mark it in evidence with the understanding that it is only for demonstrative evidence? It is not a container casting from this particular ship.

MR. FRIEDMAN: What I am interested in knowing, if Mr. Kain can make a representation, or if the captain can tell us, we have heard that these containers were I.S.O.

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containers. As I understand it, this is a piece that in the real world would be an integral part of the 20 foot by eight foot by eight foot container. What I am trying to find out, if Mr. Kain can tell us --

MR. KAIN: 20 by eight foot by eight foot container. Until this trial I never heard the expression I.S.O.

THE COURT: I don't know what we are spending time on. I thought that we had -- we had been talking a lot about a corner casting. You were asking questions about it, Mr. Kain. Mr. Friedman had asked questions about it and there has been a lot of testimony referring to it.

Captain Ash, is this corner casting sitting in front of you, is it a corner casting?

THE WITNESS: Yes, it is, your Honor.

THE COURT: Then I will receive it in evidence. I will make it a court's exhibit or a jury exhibit or whatever I have to do. Do you want to offer it or don't you?

MR. KAIN: I will offer it as a bottom corner casting on a container.

xxx (Defendant's Exhibit G received in evidence.)

THE COURT: How about the stacking plate?

MR. LOENARD: Your Honor, I have called my client

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and there is a stacking plate on the way from the pier.

THE COURT: All right. That will be helpful.

All right, Mr. Kain, go ahead.

MR. KAIN: May I ask for my last question, if your Honor please, from the reporter?

(Record read)

CROSS EXAMINATION CONTINUED

BY MR. KAIN:

Q You already told us in your opinion these containers should remain lashed, at least in part, until they are hoisted off during the discharge; is that correct?

A Until they are ready to be hoisted.

Q Now, for a moment, Captain, let's think about the loading of these containers in Damman, Saudi Arabia. When these containers were loaded, in your opinion did good stevedoring practice require that as they were loaded each individual container be lashed before the next container is hooked?

A Well, my contention isn't limited to that. My contention is that they should not have been stacked too high without proper fittings. Secondly, if they were lashed, they still should have individual lashing for the lower tier.

Q That is not my question though, Captain. My question is, in your opinion, based on your experience, does

proper stevedoring practice require that when containers, such as we have had described here, 20 by eight by eight containers, are loaded on deck of the Concordia Viking, or were loaded on deck, in Saudi Arabia, as these containers were loaded -- let's consider this four over four, this block of eight containers on the port side of number five hatch. As these containers were loaded, did they require or was it required, did good practice require that they be secured each container as it came down?

A No, no. That is not necessary.

Q And I take it from your answer that in your opinion in loading them they were stable enough to put all eight of these containers down before you started to lash or otherwise secure them; is that correct?

A Apparently.

Q Well, I am asking you is it your opinion, is that concomitant with good, safe stevedoring practice, to load all eight of these containers before you do any securing?

A It is possible. If you dunnage properly and they are trimmed properly. They don't work with speed over there.

Q Well, will you assume, Captain, that in the loading operation, the same as in the discharging operation, the lashing and securing of these containers was performed by ship's crew? Will you assume that?

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A Yes.

MR. FRIEDMAN: Excuse me.

Q My question is --

THE COURT: Wait a minute.

MR. FRIEDMAN: Loading of these, according to the captain's deposition, which is the only evidence we have on that point, in Saudi Arabia, was they were loaded by stevedores, not ship's crew, in Damman, Saudi Arabia.

MR. KAIN: I made no reference to loading. I made only reference to securing or lashing.

THE COURT: I think we may have misunderstood you. Why don't you rephrase your question?

Q I say with respect to the question I am asking you, Captain, will you assume that I am talking about a situation where the securing of the containers loaded in Saudi Arabia was to be done by the ship's crew.

MR. FRIEDMAN: I object. The evidence we have in this record, on page 17 of the deposition, is that the containers were loaded on board the ship by the stevedores in Saudi Arabia and that the crew lashed them. Now, loaded by the stevedores, the crew lashed them. We may or may not have something in between that relates to the securing -- not the securing, what do we call it? The stacking device. The loading was done by stevedores in Saudi Arabia, the lashing

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by the crew. Anything in between we don't know.

MR. KAIN: I am asking the captain to assume that the lashing or other securing of these.

MR. FRIEDMAN: I don't think I am raising an empty point. The "or other securing" is what I rise to.

THE COURT: There may be some other step and you have brought that out. Whether there is or isn't we don't know yet. But I think it is okay for him, Mr. Kain, to ask his hypothetical in the form he has, and we will keep in mind the possibility of some other step.

Q In your opinion -- and, Captain, if I understand you correctly, and you correct me if I am wrong, when these containers were loaded in Saudi Arabia it was permissible to put these eight containers on the port side number five hatch, lower them all on board, put them in place before they were secured in any manner; is that correct?

A Under most conditions, yes.

Q But again if I understand you correctly, in discharging these containers in the manner which was described to you and you are asked to assume and discharged at pier B, Hoboken, it was not permissible to remove all the lashings from the containers before they started to be discharged; is that also correct?

A Yes, that was my statement.

Q Now, Captain, using the method I described to you in this morning's session, that is, the wire lashing with the wire clips and the turn buckle, is that a time-consuming practice to secure a container in that method or using that method?

A Yes, it is time-consuming. Each individual lashing or wires have to be clipped or clamped. They have to be shackled to the turn buckle to the deck. It has to be set up tight.

Q Is it also in removing this type of securing, is that also time-consuming? Do you have to remove the nuts and the wire clips?

A Yes. That is why it was not a good arrangement.

Q That takes time, also; is that right?

A Sure.

Q Now, Captain, will you assume for the moment that on this particular voyage of the Concordia Viking she carried a total of 76 containers on deck. Could you tell me approximately, based on your experience, how long it would take ship's crew, assuming a crew of about six men, a deck force of six men --

MR. FRIEDMAN: I must rise to a question as to how long it would take to deal with 76, unless Mr. Kain can point out something else. I understood the captain's testimony to be

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that they had eleven empty and one full, a total of twelve.

MR. KAIN: If your Honor please, I asked the captain to assume there were 76 on deck.

THE COURT: What is your objection? The eleven, did he say that was all there were on deck?

MR. FRIEDMAN: My understanding of the past testimony is that there were eleven and one.

THE COURT: Let's see the deposition reference.

MR. KAIN: May I ask, if your Honor please, what the objection is?

THE COURT: The objection is that it is a clearly incorrect assumption and contrary to the captain's testimony. So let's just check that out.

MR. KAIN: The number of containers on deck in this ship is an incorrect assumption, if your Honor please?

THE COURT: I think that is the objection.

MR. KAIN: May I note for the record that it is my understanding that I can ask an expert to assume facts which are not in evidence.

THE COURT: I thought you had reference to this ship.

MR. KAIN: I do have reference to this ship.

THE COURT: It will only take a minute, if Mr. Friedman can show us the reference to the captain's deposition and that would be helpful.

(Pause)

MR. FRIEDMAN: May I make reference to the bottom of page sixteen, and at least to say the negative that as I scanned the other pages I didn't see any other reference to the number of containers being on ship.

MR. KAIN: Bottom of page what?

MR. FRIEDMAN: Bottom of page sixteen.

MR. LEONARD: I think this difficulty arises of Mr. Friedman's misconception of his question. Mr. Friedman is talking about a part of the deck and --

THE COURT:

"Q Does your cargo plan show how many were stowed; that is, how many 20 foot containers were stowed on the port side?

"A No. It says altogether eleven empty 20 foot containers and one full 20 foot container.

"Q Eleven empty and one full one?

"A Yes."

MR. KAIN: I submit that is clearly with reference to number five hatch.

MR. LEONARD: Concurred by the captain's deposition, line 11, page 15.

THE COURT: This is a matter of very simple proof. Certainly the deposition reads the way it reads and I

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think it raises a question in my mind, without trying to resolve all the ambiguities but it can be resolved by the cargo plan.

MR. KAIN: Only for the purposes of this particular question and I expect to prove it, I am asking the captain to assume. Mr. Friedman can bring out if the assumption is correct. I submit that it isn't. I am entitled to ask this captain if he will assume with me that on this voyage the Concordia Viking carried 76 containers on the ship's deck.

THE COURT: It is not a frivolous objection because we don't want to have testimony about things that clearly were not correct.

MR. FRIEDMAN: I won't stand on ceremony. I understood from the deposition there were eleven and one. If I am mistaken, and if it is, in fact, the cargo plan shows that there were 20 or 30 or 40 others, let him present it. I am not going to stand on ceremony.

THE COURT: Just get the number.

MR. KAIN: May I put the cargo plan in evidence?

THE COURT: Of course. Defendant's Exhibit H.

xxx (Defendant's Exhibit H marked for identification.)

THE COURT: Any objection to Defendant's Exhibit H?

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MR. FRIEDMAN: I haven't seen it.

THE COURT: Take a look.

(Pause)

MR. KAIN: Mark that as part of the same exhibit. May I note for your Honor's edification this was produced at the captain's deposition. It is shown on page 14 of the captain's deposition.

MR. FRIEDMAN: I don't want to read a lot about pistachio nuts. Why can't you show me where it says there were 76 containers and I will agree to.

MR. KAIN: If it is not referred to in evidence yet I submit I am entitled to ask him, subject to connection, to assume there are 76 containers aboard the Concordia Viking.

MR. FRIEDMAN: If he wants to get formal I will stand on my objection. I have been handed a list that tells me pistachio nuts, Indian gum, steel flanges aboard and nothing that says the number of containers. If he will show me how he arrives at the assertion there were 70 or 76 containers I will certainly agree to it. Why am I being put in this position?

MR. KAIN: You are being put in the position because you are raising a frivolous objection.

THE COURT: The Court has already commented on that.

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It may be in a foreign language, I haven't the faintest idea. I assume you have gone over this cargo plan and you have a basis for the 76 and that will about end it. I don't want a number --

MR. KAIN: What I am representing to your Honor is that I don't read these cargo plans. I am not the expert on it. If your Honor wishes me to, although I think it is absolutely ridiculous, may I withdraw Captain Ash and may I put on the ship's officer for the sole purpose of testifying as to how many of these containers were on board the deck?

THE COURT: Why does everybody have to be so stubborn? I assume you didn't get the figure 76 out of thin air, right?

MR. KAIN: Sir?

THE COURT: You didn't get the figure 76 out of thin air.

MR. KAIN: Obviously not. I got it from my discussions with the ship's officer and from the documents produced.

THE COURT: I will take it subject to connection then.

MR. FRIEDMAN: All right, your Honor.

MR. KAIN: If your Honor wishes me to I will be

happy to withdraw Captain Ash and put on the ship's mate to testify about it.

THE COURT: I don't wish to do that. Go ahead.

BY MR. KAIN:

Q Will you assume with me on this particular voyage of the Concordia Viking she carried on deck a total of 76 containers, can you, based on your experience, and assuming this type of lashing that I have described to you, turn buckles, wire clips and wire rope; can you give me any approximation of the time which would be required for a ship's force, described to you this morning by Mr. Friedman from the crew list, the deck force, to secure these containers? Or, if you wish, the total number of man-hours required?

MR. FRIEDMAN: I object on the following ground: missing from the statement made to Captain Ash for him to assume is whether or not all of these containers are to be assumed these 20 foot by eight by eight containers or some entirely different size? Whether they are generally stacked in stacks of two, so essentially it would be 38. Generally stacked in stacks of two or three or four, which at least common sense indicates to me might play a role in the answer, et cetera.

I am perfectly willing to accept that Mr. Kain knows or represents that the mate has indicated to him the

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answers to those questions and I have no objection to him offering that in the assumption subject to proof and connection. Otherwise, I object to it as being incomplete.

MR. KAIN: If the captain can't estimate any of these things --

MR. FRIEDMAN: It is plain, your Honor, whether there are 76 eight foot containers or not there is a difference.

THE COURT: Does it make a difference on even a general estimate as to how they were stacked?

THE WITNESS: Yes, it does. Also what area it covered, whether they were three in a row or two in a row. But I would say offhand it looks like an all day job.

Q In your opinion would the securing on deck of 76 containers in any fashion require some considerable amount of time?

A Yes. I have to qualify that.

THE COURT: I beg your pardon?

THE WITNESS: I would say 77 containers on deck would require considerable time for the crew as a lashing gang, considerable wire, considerable number of turn buckles, considerable number of shackels, and this would not be a routine deck load securing. 76 containers, a ship is in the container business.

Q Captain, assuming this considerable amount of time

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that you have referred to with a deck load on the entire ship, assuming 76 containers on deck, is it in your opinion, regardless of the type of lashing used or the method of securing used, is it in your opinion feasible and good stevedoring practice to follow the procedure you testified to this morning of taking the lashings or some of the lashings off each container immediately before it is raised?

MR. FRIEDMAN: Object to the question. The question says is it feasible and the same question asks is it good stevedoring practice. Those are two different questions.

THE COURT: Let me hear the question.

(Question read)

THE COURT: Is there a difference between feasibility and good stevedoring practice? Is that difficult for you to answer?

THE WITNESS: Yes, it is, your Honor.

THE COURT: You take your time, Mr. Kain, and ask it one at a time.

Q Is it good stevedoring practice to follow this method, assuming the method of securing I have described to you, at least the partial method, the lashing with wires and clips, with that many containers on deck. Assuming whatever lashing is used incorporates a wire, wire clips and a turn buckle, is that good stevedoring practice to have all

or a portion of these lashing removed at the same time the container is being discharged, the individual container?

A There are too many qualifications. Sometimes yes, sometimes no. Depends where you discharge, who is moving them away, what gear is being used and who is doing the lashing work.

Q You have no actual idea, do you, Captain, and I know you gave us a range, but you don't know the actual weight of containers which were carried on the port side of the Concordia Viking on July 12, 1971, do you, sir?

A Only on the basis that they were I.S.O. containers; that the qualifying list of what are accepted standards for the tear weight and the gross weight, that the 20 foot eight by eight is 3650 pounds for a container if it is empty and if it meets I.S.O. standards. I gave it an additional poundage the other way.

Q Will you assume with me that these empty containers weighed two tons each?

A 4000 pounds, yes.

Q Will you assume that?

A Yes.

Q All right then. Now, will you also assume with me, Captain, that these containers, eight of them on the port side were stowed with the long ends of the container fore

and aft and the eight foot dimension of each container athwartship. Do you follow me?

A Yes.

Q That is from side to side.

Will you also assume with me, Captain, that there is or was at number five hatch of the Concordia Viking one pair of cargo booms; that is, one on the starboard side, one on the port side, stepped at the forward end of number five hatch -- do you follow me so far?

A Single gear, yes, sir.

Q And will you assume with me, Captain, that they were using at pier B on July 12, 1971, a house fall. Do you know what a house fall is?

A Yes.

Q What is a house fall?

A Instead of using the winch fall on the boom adjacent to the dock, they use the same winch but they run the wire all the way to the top of the structure of the pier, which has a big iron framework all along it and they place the wire and the block that it goes through up on the top of the house. That is giving them a much longer reach with the cargo. They can land it on an upper level or they can land it adjacent to the pier where the ship's boom wouldn't reach that far. That is a house fall.

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Q And might the use of a house fall, Captain, be dictated by the narrowness of the string piece of the pier?

A Oh, certainly.

Q Would you tell his Honor and the ladies and gentlemen of the jury what a string piece is on the pier?

A The string piece on the pier is colloquially the area of the pier -- really the apron, from the wall or the shed of the warehouse out to the edge of the dock. The edge of the dock is really the string piece. This is the apron. And lots of times the ship's cargo gear with long areas would not reach safely there, so they use a house fall.

There is also another factor, that if it reaches it might be too low and when they bring the cargo out, if they want to land it on a truck chassis or if they want to land it on a railroad car, there wouldn't be room enough between the boom top.

Q Captain, will you look at this ship's plan of the Concordia Viking which is Defendant's Exhibit C in evidence, and will you open it. I direct your attention to the vessel's number five hatch.

A Yes.

Q First of all, Captain, how many hatches were there on this ship?

A Five. Three on the fore deck and two on the after

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deck.

Q Will you tell me, Captain, referring to that plan, how many double rig hatches does that plan show?

A Sir?

Q How many double rig hatches are shown on that plan?

A Four hatches are double rigged. Number five is single rigged.

THE COURT: What is the difference between double rig and single rig?

THE WITNESS: In a double rigged hatch there are two booms at the forward end of the hatch and two booms at the after end of the hatch, meaning the hatch is big enough to work two gangs in it. Whereas at number five there was only one set of booms and so only one gang could work there.

THE COURT: At the forward end of the hatch, is that it?

THE WITNESS: Yes, it is at the forward end of the hatch.

THE COURT: Thank you.

Q Will you assume with me on July 12, 1971, when the Concordia Viking was at pier B, Hoboken, New Jersey, number five hatch, the ship was starboard side and number

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five hatch was rigged with a house fall; will you assume that?

A Yes.

Q And will you also assume the stowage which has been described to you on the offshore or port side of number five hatch. Bearing those assumptions in mind, Captain, was the rig of the booms or did the rig of the booms as I have asked you to assume, provide for a swinging boom at number five hatch?

A It could, but I didn't see any need of it.

Q Assuming number five hatch rigged with a house fall, starboard side to, doesn't a house fall, rigging with a house fall with only one boom eliminate a swing boom?

A Yes. Although it doesn't rule it out completely.

Q All right, let's make a further assumption, Captain. Will you assume that the starboard winch for the cargo fall at number five hatch, that the wire from that winch, instead of going up through a boom, was led ashore through the block on the house fall, back down and shackles into the cargo fall from the port or the offshore winch so there was a single hook; do you follow me?

A That eliminates the starboard boom from use.

MR. FRIEDMAN: Just a minute, Captain.

I think we can safely say there is nothing in the evidence at this point that supports all of these factual

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details.

MR. KAIN: I am asking the captain to make certain assumptions.

MR. FRIEDMAN: I don't see how we can have a lengthy dissertation on things that are not in the record or have any basis for coming into the record. If there is a witness standing by that Mr. Kain has spoken to that he expects to prove this, I won't stand on ceremony.

THE COURT: I will take this subject to connection. He has this witness on the stand.

MR. FRIEDMAN: Is he representing to your Honor that he will be able to prove -- that there is proof available of all these details?

MR. KAIN: Obviously I do, your Honor.

THE COURT: The problem about the number of containers it seemed to be a contradiction between the number 76 and what was in the captain's deposition so I went into that in some detail.

I assume really that what you are saying, you haven't gotten out of thin air and you are going to put in evidence to that effect. It is up to the jury; right?

MR. KAIN: For the most part I say to your Honor it is in. Mr. Picinich testified to the use of a house fall.

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MR. FRIEDMAN: I didn't rise to that, but as to the wire this wire is being led off.

THE COURT: I will let this in. I have a problem and I wish these -- these descriptions are so unfamiliar to me and I have some background on ships, a little bit,but for the life of me I don't know what a house fall is. I don't picture cargo operations, the lines and so forth, and I don't understand why we are subjected to all this discussion when we should be having pictures, blackboards, slides, something. Now we have a blackboard and somebody can go over and draw it. But I'm sure that my picture of this is inaccurate and I'm sure that the jury --

MR. KAIN: At the risk of incurring your Honor's displeasure, I don't believe in the cross examination of Captain Ash it is my function to call Captain Ash to a blackboard. I intend, as part of my case certainly, to the best of my ability, to illustrate it both by means of blackboard and whatever other aids may be available to me.

THE COURT: I am just saying, Mr. Kain, I really like to understand testimony as it comes in. I like to understand it. Now, I don't understand this. It is up to you.

MR. KAIN: All right,sir. I will do my best. That is why I asked Captain Ash to describe a house fall and

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why I asked him -- I have some difficulty because I don't know how to communicate with Captain Ash in terms he will understand that may perhaps still be understandable to the jury but I hope to connect these up.

THE COURT: All right, do your best.

BY MR. KAIN:

Q In this rig I have described to you, Captain --

THE COURT: Take a minute and go over the rig.

Q Captain, will you assume to me that would normally, if we were using both booms, both booms, and the cargo fall is the runner, is it not, that hoist the draft of cargo on the boom?

A Yes.

Q Now, this ship is starboard side to. Will you assume the wire, Captain, that was normally the cargo runner or the hoisting wire on the inshore or starboard boom was taken off the boom, led ashore to this block or house fall, passed through a block on the house fall and brought back aboard the ship where it was shackled into the hoisting wire from the port boom, the offshore boom.

A Yes.

Q That is a familiar rig to you, is it not?

A Quite familiar and frequently used.

Q And in this type of a rig you have in effect -- let

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me rephrase the question.

If you were using a Burton rig, Captain, where you were using both ship's booms instead of a house fall, would you have in this type of a situation, starboard side to, your starboard boom out over the pier; is that not so?

A Yes.

Q And you would have your port boom somewhere either on the square of the hatch or the deck adjacent to the square of the hatch; isn't that so?

A It depends. If you have a deck load you may have it over the load.

Q I see, either somewhere in the deck or over the square of the hatch?

A Yes.

Q When I refer to the square of the hatch we know I am talking about the opening on deck through which the cargo will come out of number five hatch; isn't that so?

A That is correct.

Q And when you have a Burton rig like this between the two boom heads, that is one over here and here, you have either a Schooner guy, and that is a guy between the two boom heads, is it?

A Yes. But you can't in this situation, you can't have that.

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Q I am just trying to illustrate what I am talking about. Or you may have lazy guys which come down one on each side?

A Yes.

Q That is to prevent the booms from going apart; right?

A Yes.

Q In this situation that we are talking about, using a house fall, will you assume with me that the starboard wire from the starboard boom goes through this block on the pier, comes back and is shackled or married, put together with a hoisting wire from the port boom?

A Yes.

Q And in order to stop the port boom from moving towards the shore when you take a string, there is a working guy and a preventer guy that hold the port boom in whatever position is spotted; isn't that so?

A Yes, but that isn't sufficient. When you are using a single boom you have to have a guy on both sides.

Q I am talking about this house fall.

A With the house fall you have eliminated one boom but you don't want a moving or swinging boom that is going to swing while your load is in process. You want to secure it.

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Q Fine. That has nothing to do with the question I am asking you but there are guys to keep the boom head where it is placed; right?

A Yes.

Q Now, assuming this type of a rig with a house fall, a single cargo hook, and will you assume that the testimony in this case is that there wasn't any spreader used in discharging these containers and you know what I mean by a spreader,don't you?

A Yes, I know what you mean. There were four legs with a bridle.

Q With a hook in each one?

A Yes.

Q And these boom heads, the port boom, the one that is on the ship with this house fall, that had to be positioned somewhere with respect to this stowage of eight containers, did it not?

A Oh, yes.

Q And based on your experience as a ship's officer, the experience you gave us the other day, where in your opinion with respect to this block of eight containers, where should the port boom be positioned; that is, the head of the boom, the end of it?

A Right over the center of the lift, the load. If

you are picking up the first container, spot your boom right over the head so you can take a straight lift.

Q Over the head of the container. Are you saying that the top of this boom should be directly over the container that is to be lifted?

A With a lift of this type in this area, yes.

Q And that is the responsibility of the longshoremen to spot the boom where they want it for the work they are doing; isn't that so, Captain?

A That is their usual --

MR. FRIEDMAN: I only object in this sense: that with respect to who does the work is one thing. With respect to the legal responsibility your Honor will charge the jury.

THE COURT: We passed that long ago. Mr. Heller asked him a number of questions about what should be done and shouldn't be done. So if he knows whose responsibility it is I will let him answer that.

Overruled.

Q Assuming further with me, Captain, that the two cargo winches at number five hatch that control the falls. In other words, that are going to raise the container; do you understand which one I am talking about?

A Yes.

Q Will you assume that these winches had a line pull of three tons in single gear and five tons in double gear?

A Yes.

Q Do you know what I mean by that?

A Yes.

Q Will you tell us what pull in single gear and line pull in double gear is?

A It is the same thing in your car. If you are pulling up a hill, your regular gear will not give you the engine traction that you need and you put it in second gear or third gear: on cargo winches we have two gears, single gear and double gear. Normally if you are using single gear the energy exerted will be a force of three tons. If you put it in double gear it will be a force to five tons. I believe that is clear.

Q And that means when it is in three tons, single gear, the line pull will be three tons; right?

A Yes.

Q And five tons is the double gear?

A Yes.

Q All right. Now, assuming the stowage as it has been described to you, these blocks, will you assume that these four containers, the longshoremen using a four-legged

bridle which you described, with the hooks on the end, wished to pick up the inboard, the one next to the hatch coaming, the inboard after container. Do you follow me?

A Yes.

Q Did I understand you to say that good stevedoring practice would require that this port boom, this up and down boom should plumb directly over the container it is going to pick up?

A If they are using the house fall, yes.

Q I asked you to assume that. Is that correct?

A Yes.

Q Now, at this point, Captain, after the hooks are attached and before the container is raised, the top of this container is some 20 by eight by eight, the top of the upper container is sixteen feet above the deck; is that correct?

A Yes.

Q And a four-legged bridle, when the strain is taken on, the middle of the bridle is on the cargo hook, the four lines going out from it. About how high when the strain is taken, before it is lifted and there is just a strain on it; about how high above the top of the container which is sixteen foot, the top of which is sixteen foot above the deck, would the cargo hook be?

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A Four or five feet. For an adequate lift without putting too much of a strain on the bridle legs. More the horizontal the greater the strain. It should be a fair angle. I'd say four, five feet.

Q So that would mean that where the cargo hook is it is approximately 20 to 21 feet above the deck?

A 21 to 22 feet, yes.

Q Now, will you assume with me that the testimony in this case is that at the time of this accident the container being raised had been lifted an additional eight feet so that the bottom of this container was then clear of the container which was immediately outboard of it; is that correct?

A I don't get that. If the thing was lifted eight feet --

MR. KAIN: Perhaps the report will let me illustrate what I am talking about.

If we assume these are two containers, these stenotype pads. Let's assume there is a similar one here and there are two more just like this inboard, and this is out near the water, outboard. Will you assume with me that the testimony in this case is that at the time this accident occurred this inboard container had been lifted until the bottom of this container was clear of the upper con-

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tainer which was outboard of it; do you follow me?

A I follow you. I am assuming it.

Q Well, that is the testimony, Captain.

THE COURT: Are you saying it couldn't have happened that way?

THE WITNESS: Well, I say that when it was lifted, and it could be that high, it still struck the other one before it got that high.

THE COURT: Go ahead.

Q Assuming that it was lifted this eight feet which I have just described to you and illustrated there, that would mean that in addition to this 20 or 21 feet that we previously had with the sixteen feet plus the bridle below the cargo hook, we now have an additional eight feet so we have 28, 29 feet above the deck; is that correct, where the cargo hook is?

A If I were to assume that, yes.

Q Based on your experience as a ship's officer and your knowledge of stevedoring, in your opinion using the house fall I described and winches with the lone pull I have described to you, would it be physically possible to Burton or move that container across that deck to put it on the pier when it was a distance of 28 or 29 feet above the deck?

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A Well, sure. But you don't Burton it horizontally. I mean absolutely you could use the married fall using the house fall. It only weighs two tons.

Q I am only asking you, Captain, assuming a two ton container in the position I have described to you, do the ship's winches, which I have described to you, have sufficient power to move that container across the deck to the dock?

A Of course.

Q Without lowering it or changing its position, to move it in a straight line across the deck?

A I am assuming what you say but I do not consider it feasible. There is no necessity for raising it that high.

Q I am only asking you, Captain, in your opinion based on your experience, is it physically possible to move a container with a four-legged bridle, which has been raised to the height I described to you, in a straight line across the deck in order to lower it down on the pier?

A Not necessary to move it in a straight line across the deck 28 feet high. It would never be done.

Q That is not what I asked you. I asked you is it physically possible?

A I suppose it is but it is not a practical operation

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that any stevedore in his right mind would do.

Q Now let me ask you again, borrowing the reporter's paper here, assuming the same situation with two of these.

MR. LEONARD: Would you hold it up so the jury can see it?

Q Assuming that these are the two inboard containers, one above the other, and we have two more out here.

A Right.

Q And that this one is the one that is going to be moved over to the pier.

A Right.

Q If you were the stevedore foreman or if you were the longshoremen operating the winches you just told me I think you would not consider raising this eight feet and then trying to move it over?

A That is right.

Q Wouldn't you, Captain, raise it maybe just enough to clear and then start to Burton it across the deck?

A Absolutely.

Q And if on the starboard side of the ship; that is, the ship opposite the side we are talking about; if on the starboard side there were similar stowages of containers too high, wouldn't it be impossible, without removing the upper one on the inshore side, to Burton a container from the

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offshore side above the stowage of two containers high?

A It would be absolutely stupid.

Q I say it would be impossible, wouldn't it?

A I wouldn't swear to the impossibility but it is a stupid, insane practice I can't conceive of. They would clear the deck on one side and then clear the deck on the other. They wouldn't leave the deck too high on the inshore side with the idea of lifting every load over it.

Q You could Burton it off the inshore side or over if you had two containers side by side; there wouldn't be any problem moving it across two eight-foot containers?

A It would be easier if they were off altogether.

Q I say it could be done this way, could it not?

A Yes, it could be, because you have to get up to four feet and a half or close to five feet to get over the bulwark. So three feet more is not that much of a problem. But even then it is not good practice.

Q Now, Captain, will you assume with me that this block of eight containers that we have been talking about on the port side of number five hatch, will you assume with me that these four bottom containers were in effect not in a block but were chocked, and you told us this morning that chocking is dimensional lumber running between the bulwark and the container on the outboard side, and from the hatch

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coaming -- that is the hatch coaming is the steel like a rail or wall around the hatch opening to the other side?

A Yes.

Q And you told me, if I understood you correctly, that in your opinion this was a proper method of securing deck cargo; is that so?

A That is the customary way, yes.

Q And will you assume that before these containers were put on deck there was dunnage underneath them; is that an accepted practice?

A Yes; if it is dunnaged properly, it is.

Q And one of the reasons for that, Captain, is that you don't want metal to metal contact, do you?

A That is right.

Q Now, will you also assume, Captain, that before the upper containers were put on there was dunnage put in between the upper and lower containers. That is the testimony in this case. And that is a proper way of securing or stowing containers, is it not, Captain?

A This is not a customary way on the top tier, because if your bottom tier is level, your top tier will also be level. If you are going to put dunnage under it, you are going to create a sliding situation. These containers are made for stacking, if you have the proper gear. So there is nothing wrong with putting a container on top of a container without dunnage unless you have some other need, such as trimmin

(Recess)

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MR. KAIN: If your Honor please, I anticipate a problem. I have been trying to line up witnesses and I have Dr. Kaplan on call for the first thing Tuesday morning. It was a very difficult thing to arrange for. Inasmuch as this is Mr. Friedman's last witness and it is in effect redirect, can I assume or can I ask Mr. Friedman if he has any objection to interrupting the captain long enough to let Dr. Kaplan testify?

MR. FRIEDMAN: Let me see if I can find something out because I had gotten the impression they had no other witnesses. They said they had a mate. They told us previously they had no witnesses from the ship. What is the lay of the land here?

MR. KAIN: I am only asking if I can put a medical witness on first thing Tuesday.

MR. FRIEDMAN: In connection with responding thereto I would like to know what lies ahead so I am not making assumptions that are incorrect.

THE COURT: What does it depend on? It is a question --

MR. FRIEDMAN: How late in the case and where Captain Ash fits in.

MR. KAIN: I would suggest after Dr. Kaplan finishes, the captain goes back on the stand.

THE COURT: It is just one witness?

MR. KAIN: Just one witness.

MR. FRIEDMAN: Okay.

I'm dealing with Captain Ash's time. May I ask him? He is also entitled to consideration.

(Discussion off the record)

MR. FRIEDMAN: I just don't want to see Captain Ash hung here when he is not needed. On the other hand I don't want to wind up with a gap. Dr. Kaplan will be on the first thing in the morning?

MR. KAIN: That is my impression. I am just asking if I may beg your indulgence to put on the doctor.

THE COURT: If Mr. Friedman is worried about the length of time it will take -- I don't know what he is worried about but maybe he is worried about that. Can you give us an estimate?

MR. KAIN: My examination of Dr. Kaplan will be I anticipate relatively brief. I would anticipate the bulk of the doctor's time on the stand will probably be Mr. Friedman's.

THE COURT: I just cross examine him by counting his money.

I would suggest that Captain Ash come fairly close to the beginning of the morning. I have an idea it

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won't be a long witness. Then we will go right into the redirect of Captain Ash.

MR. KAIN: These doctors have all of these schedules and sometimes it is virtually impossible.

MR. FRIEDMAN: Just one other matter, your Honor. With respect to the lost wages of Mr. Picinich for the ten months that he alleges he was not working for the period of time in question, the guaranteed annual income, guaranteed annual wage for longshoremen which was in effect at that time, 19 -- we are talking about July, '71, to April, '72. During that period of time it was in the neighborhood of a thousand a month. Actually more, $12,157 up to October, '71, and then it gets up into $13,665. I am perfectly willing, if counsel are, to stipulate to a lower figure, simply a $1000 per month figure to the number of months, without conceding any number of months. That during that period of time the guaranteed annual income ran at approximately a thousand a month.

MR. KAIN: If we are talking about G.A.I., I have subpoenaed the New York Shipping Association, Mr. Picinich's G.A.I. payments actually paid to him. I don't see why I should stipulate or whether there is any reason to stipulating to a lesser amount if we have the actual G.A.I. amounts paid to him.

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MR. LEONARD: As I understand the offer, the offer is being made to use G.A.I. to establish a wage rate for Mr. Picinich in lieu of actual proof of that. I certainly for one will not stipulate to that at all.

MR. KAIN: Mr. Picinich didn't testify he qualified for it.

THE COURT: Get your records in.

MR. FRIEDMAN: Particularly now that we are going over until Tuesday, I don't mind subpoenaing a few presidents of corporations to testify that two and two are four if counsel won't stipulate to it.

MR. LOENARD: Is that a threat?

MR. FRIEDMAN: You can take it the way it sounds. $4.60 an hour is the contract wage. If I have to subpoena somebody from some corporation, but why do I have to do that?

THE COURT: When you mention guaranteed annual wage I assume that you mean that means something. Is it of no significance? Is there a guaranteed annual wage?

MR. KAIN: There is a guaranteed annual wage. It has certain conditions precedent before --

MR. FRIEDMAN: Is there any doubt that Picinich is qualified for guaranteed annual wage on the numbers of hours and years that he worked in the past? If there is,

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maybe we will have to subpoena that record.

MR. LEONARD: If you are prepared to ignore the conditions which Mr. Kain alluded to, which is his availability to work on the days in question.

MR. FRIEDMAN: I am not asking you that. All I want to agree upon is that the rate of earnings during that period for a working longshoreman such as Picinich were in the area of a thousand dollars a month. You don't stipulate he lost any time from work as a result of that accident. That is a matter of argument and dispute.

MR. KAIN: If I apprehend correctly, he is asking me will I stipulate what the hourly rate was for a longshoreman over particular years, I will be happy to do so. This is a matter of record. No reason we should fight about what the hourly wage is. But if he is asking me to stipulate, without any testimony, as to what G.A.I. payments Mr. Picinich was entitled to for a specific year, no.

THE COURT: Please. The way I would picture it, without knowing a lot about it is, that if someone, a group of employees are entitled to a guaranteed annual wage and if you assume that they haven't fallen off the ship and you are trying to figure out what they would have gotten or he would have gotten, the plaintiff would have gotten if he hadn't had this accident, I guess I would assume that he

was working up till that point and that if he hadn't had this accident he would have been able to work after that point.

Now, I don't really know very much about it but it seems to me that that is undoubtedly all a matter of record and you just take away the fact, you assume he didn't have this accident and things would have continued as they were before, whatever they were. That is something Mr. Friedman is entitled to talk about when he is talking about damages.

MR. KAIN: If that were all it was, your Honor -- first of all I ask to give me a minute on this. Let me lay it out for you. These longshoremen are not employees of John W. McGrath Corporation except on the days that they work for John W. McGrath Corporation. They are supplied from -- you heard the reference to the bi-state. That is the New York-New Jersey Waterfront Commission hiring hall. They are guaranteed, some of them, if they meet certain requirements, they are guaranteed either 2000 or so hours. They have to meet that first.

THE COURT: Who guarantees this?

MR. KAIN: The New York Shipping Association, ILA, jointly administered.

THE COURT: They will fill in the gap between what they can collect from McGrath?

MR. KAIN: Yes. All the stevedoring employers in this port. Now these longshoremen all have various type seniority cards. When they are, for example, a man at the highest seniority is an A card. The lowest I think is around L. They have in these hiring halls what they call a voluntary list and an involuntary list. If I have an A card and I want to work tomorrow, when they pre-order these gangs I tell the man in the hiring hall that I work out of, in this case, Hoboken, that I want to work tomorrow. I have an A card, I have top priority. No way that I am not going to get a job unless the port is on strike. And it goes down the voluntary list until it comes to L. Suppose I have an A card and I say to the man in the hiring hall, "I don't want to work today, I got an A card." They go down, fill it up --

THE COURT: He goes in and says, "I don't want to work"?

MR. KAIN: Yes.

THE COURT: Why would he not want to work?

MR. KAIN: Occasionally there are people who would collect it without working for it.

It goes on a voluntary list, the A card has top priority. They don't go to the involuntary list in any seniority category until they don't have enough men on the

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voluntary list to fill all the jobs that have to be filled. Then they start at the bottom with the L card and they go back up in seniority. The man with the A card has the last chance to refuse. If they take a man with an L card on the voluntary list and he says, "I'm going fishing, I don't want to work," he has a debit against him. If he has a certain amount of debits he looses his right to a guaranteed annual wage.

I have a case where a longshoreman has worked a half day in five years who is making guaranteed annual wage and he has a lawsuit the one day he did get caught, he injured himself on his way to my ship. He hasn't worked a day in five years and he is entitled to do this.

So when you say to me will I stipulate to an hourly wage that is a matter of contract. All longshoremen in the port get X amount of hours. That I will stipulate to.

If you have to say to me that you have to stipulate that he is entitled to X amount of GAI, I can't do it for this reason, and this is another reason: assuming that Mr. Picinich is not obtaining any compensation treatment, he is not a comp case. Incidentally, from his GAI they deduct any compensation payments he may get, they deduct any unemployment benefits he may get from the GAI.

Assuming he is not on compensation, if he goes

down to the hiring hall and badges in so he gets credit for a day whether he works or not, by that simple act he certifies he is ready, willing and physically able to work as a longshoreman.

If we are going to be talking about periods of disability it becomes material whether he badged in on any particular day.

MR. LEONARD: One thing, your Honor, just to add to this. Mr. Picinich received GAI payments in 1972 covering the period of this disability, some five thousand odd dollars. I think it ill-behooves the plaintiff to make an application to calculate GAI as a wage basis when the plaintiff already has received the GAI. You can't do it both ways.

MR. TAIELMAN: Maybe we can get across the whole thing. Mr. Kain has under subpoena the New York Shipping Association wage records of Mr. Picinich, which I do not have. I have another sheet which is probably identical to his sheet. If we can agree that this is what the past records show we will all have our basis for argument. For example, your Honor, in 1970, the full year, the calendar year of '70 which he was not injured -- in fact none of the injuries occurred -- he earned $10,542. There were contract wages increases between that period and the March, '72, period

but I will ignore it.

THE COURT: What you say obviously ought to be the basis for working something out.

MR. FRIEDMAN: If they can agree in the year '69 and the year '70 the records disclosed that his earnings were, and they were almost identical for each of those years, $10,631 and $10,542, that is all the agreement I seek.

THE COURT: I would think that could be agreed to, couldn't it, what he actually earned?

You look at that over the weekend. I can't understand anything wrong in principle with what Mr. Friedman proposes on that. If there is a matter of question of the accuracy of some figures --

MR. KAIN: There is more at stake here. Let's assume that Mr. Picinich, and there has been very little testimony about it. I know he claims to have been totally disabled and not to have worked for ten months. But beyond that period whether he accepts these things or not or whether he gets them, he can't, for example -- let's assume --

THE COURT: Mr. Kain, this is all passing me by. As far as I know in this case there is a claim for lost earnings for ten months only.

MR. KAIN: And no more.

MR. FRIEDMAN: Correct.

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MR. KAIN: I never had this before either.

THE COURT: I think that has been evident.

Isn't that right?

MR. FRIEDMAN: Absolutely.

THE COURT: Now, the claim for the first ten months, and there is obviously the additional claim which will be argued much more extensively that $10,000 of lost earnings is the claim for the mental change.

MR. KAIN: We had better get this on the record.

THE COURT: The reporter has been taking it down.

I will see you Monday morning.

MR. FRIEDMAN: If I don't have an agreement now, I will have to subpoena.

THE COURT: Don't subpoena. I will put that on the record.

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ANTON PICINICH,

vs.

CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP CO., INC.
SKIBS A/A SAMUEL BAKKE,
Defendant and third party plaintiff

vs.

JOHN W. McGRATH CORP.
Third-party defendant.

Before: HON. THOMAS P. GRIESA, District Judge.

New York, October 14, 1975

October 16, 1975

STENOGRAPHER'S MINUTES

TESTIMONY OF CAPTAIN ASH

MR. FRIEDMAN: May we put up what we had Thursday afternoon the table?

THE COURT: Yes.

MR. FRIDMAN: May I advise for the record that Mr. Leonard was kind enough to have his client produce a device which is in this bag which has not yet been marked but with the Court's permission I will remove from the bag and have it marked as Plaintiff's Exhibit 11.

Any objection to this going into evidence?

MR. KAIN: I thought it was in.

MR. LEONARD: It hasn't been marked. I assume the tender is not necessarily that this is the exact type stacking device but one of them.

MR. FRIEDMAN: Yes.

THE COURT: Any objection to Plaintiff's Exhibit 11 going into evidence?

It is received.

xx (Plaintiff's Exhibit 11 is received in evidence.)

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Now, Captain Ash, it has already been stipulated, and we don't have to go through questions, that this is an example of a type of stacking device, as we have been using the phrase, for cargo containers; is that right?

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A Yes.

Q Now, we have in front of the jury as Exhibit G a model, in fact a cutout of a corner of these 20 feet by 8-foot by 8-foot, or that type of container; correct?

A Correct.

Q Now, as we can see, without taking the trouble to describe it in words on the record since it is visible to everybody; in the corner there is a particular piece with various holes on the top, sort of a rectangle on the side, a circle on the side, a different shape, but those openings; correct?

A Yes.

Q What I want to know is this: this kind of apparatus, in how many of the corners of the box -- you have a 20-foot by 8-foot by 8-foot rectangular, large sized box and that would involve literally eight corners. I think I am correct.

A Yes.

Q Now, in how many of the corners ordinarily would this kind or something similar to it be, these holes?

A All eight of them.

Q So that although this was produced as the bottom corner of the particular box from which it was taken, you tell me and would it be fair to say that something similar--

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THE COURT: He has already said that. Let's move on.

Q Now my question is how does this, now referring to Plaintiff's Exhibit 11, the stacking device, work, if it does, in conjunction with the container corner, Exhibit G?

A It fits right in.

Q Like this (indicating)?

A Yes. That is now a receptacle for a container to be put right on top of it when you are stacking. That is known as the stacking plate.

Q And what would come down upon it would be literally the same kind of opening except coming down?

A Yes. It would be the bottom of the container on top of it.

Q Now, Captain Ash, when, if you are leading a ship, if a ship is being loaded in any port, be it a foreign port or any other port, and you are loading these cargo containers in two tiers. At what point in the sequence does the stacking device get placed in?

A The bottom plate would be just half of that. It wouldn't have the bottom piece. That sits on the deck or it is secured to a girder or to the deck itself so that the bottom sits on it. That would be half. Then in between each two, if you go up two high this is inserted in all corners if you go three high, then there are more.

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Q Captain, before the second tier container is actually lowered down upon the top of the first tier container, does the restraint stacking device have to have been installed?

A Yes.

Q Now, if you will assume that in this case the testimony has been to the effect that the Concordia Viking, at least in the number 5 hatch area, had cargo containers in a Saudi Arabian port by stevedores of the Saudi Arabian port, the local stevedores, and that after the cargo containers were on the deck, there were deck lashings applied by the crew -- do you follow me?

A Yes.

Q Now, my question is, sir, was it the crew of the ship or the Saudi Arabian stevedores who would, in the ordinary practice of stacking devices were being employed, who would have actually fit in the stacking devices?

A The stevedores.

MR. KAIN: If your Honor please, I have an objection unless the foundation is laid that Captain Ash has some knowledge of loading procedures in the Persian Gulf.

MR. FRIEDMAN: Excuse me, if I may pick up that question.

Q Does it depend at all upon Persian Gulf procedures or does it depend upon the sequence that we have just

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described as to not onloading or dropping, as it were, the second tier until the stacking device is in place, if it is being used?

A That's the procedure, to use the stacking devices on the containers.

THE COURT: Wait a minute. There was an objection by Mr. Kain. Had Captain Ash answered?

MR. FRIEDMAN: I thought I clarified the point. Maybe I didn't. I don't know.

MR. KAIN: My objection was to Captain Ash testifying as to what the procedure was in the Persian Gulf as between functions performed by the stevedore in the Persian Gulf and ship's crew in the Persia Gulf unless a foundation had been laid.

THE COURT: The question was in very general terms, and if you can answer it, you can answer it. If it depends on particular Persian Gulf things that you don't know about, of course you couldn't answer it. But the question is general and if you can answer it, go ahead and answer it.

THE WITNESS: I have answered in a general way that while the loading is in progress between each tier, the stevedores will place the stacking plates.

Q And if they load the second tier box on without using stacking devices, is there any, so to speak, reasonably

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available way to install them in afterwards?

A No, there is not.

THE COURT: So it was the stevedore's responsibility to put them in over in Arabia; is that what you are telling us?

THE WITNESS: No, your Honor.

THE COURT: I thought that's what you just said.

THE WITNESS: The stevedores in the process of loading put them in. It is a regular loading operation. But the ship has to furnish them.

MR. FRIEDMAN: That would be my next question.

THE COURT: As far as putting them in, the stevedores would do it; right?

THE WITNESS: Yes.

Q Now, the providing of these or similar types of stacking devices in whatever port that the onloading is going on, ordinary practice, who provides it? I think you may have answered that question for his Honor. Who provides the stacking devices?

A The ship.

Q Now, with respect to the bottom tier of the cargo containers and the deck lashings, or the lashings being applied to the deck, did you testify on Thursday to the use of something called deck pads or padeyes?

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A Yes.

MR. FRIEDMAN: May this be marked Exhibit 12 for identification, please?

(Plaintiff's Exhibit 12 is marked for identification.)

MR. LEONARD: May the record indicate the third-party defendant objects to this line of testimony as constituting improper redirect examination.

THE COURT: Overruled.

(Discussion off the record.)

MR. KAIN: I have no objection if Captain Ash can identify this.

THE COURT: Exhibit 12 is received.

(Plaintiff's Exhibit 12 is received in evidence.)

Q Captain ash, can you tell us about the yellow sheet that's attached to that page, is that accurate as a drawing, not as a photograph, show what at least is one common type of padeye used of the sort you have touched on in your testimony?

A Yes.

MR. FRIEDMAN: May I just hold this up in front of the jury? It doesn't take much to examine it.

(Pause)

Q Simply an upside down steel U with a fixture at the

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foot so that it can be secured to the deck?

A Not necessarily on the deck. It can be on the bulwarks. They are all over.

Q And then in the case that we are here concerned with, either shackled or a wire rope would be run through that loop and the various tying procedures that you have described?

A Yes. That would be around the container, not under it.

Q Now, excuse me if I am skipping around a little, Captain Ash, you had an opportunity to be shown by Mr. Kain, I believe, Thursday what has been marked in evidence as Exhibit C, and before this moment you have had also a chance to look at it more closely than you are looking at it now?

A Yes.

Q From the close look that you took, and I don't mean at this moment, can you tell us with respect to the number 5 hatch area, and if it will speed things along we have a vessel, do we not, that on the starboard side--(at the border). We will call this the top, the bow. I am not going to try to make a representational drawing. But it is the right side of the vessel that was up against the pier on this ship at this time.

A Correct.

Q Now, staying with the number 5 hatch area, which we are concerned about, there was a certain distance, was there not, from what we call the bulwark of the ship, the rail on the starboard side. That gets to be called the inboard side because that's the side against the pier; right?

A Yes.

Q So going --

MR. LEONARD: Inshore side.

Q Excuse me, inshore side, Captain. The inshore side from the bulwark to the rail there is the deck; right?

A Yes.

Q And then what ends that deck area?

A The hatch coaming, the opening in the center of the ship.

Q When you say coaming that means a short wall that runs up a bit; is that right?

A It would be similar to what is in the witness box here. A short wall to protect --

Q Now my question is, on this vertical bulwark, that's the inshore side of the ship, inwards to the hatch coaming at the number 5 harch, what did the plan indicate was the distance? You may not have that in mind so I will give you the mpa.

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A The forward dimension was about 20 feet 6 inches, if I recall.

Q Is there a number on the plan?

A Yes. At number 5 hatch, on the forward end the distance overall is 20 feet 10 inches.

THE COURT: What distance is it from the bulwark to the hatch coaming?

THE WITNESS: From the hatch coaming to the bulwark on the corner, on the forward end, it is 20 feet 8 inches.

Q Now --

THE COURT: That's on the starboard side?

THE WITNESS: Starboard side on the forward end from the aft looking forward.

Q And at the aft, or the rear end of the number 5 hatch area, does the plan indicate what the distance is?

A 19 feet 10 inches. It looks like a 10 to me.

Q Just a little bit narrower.

A Yes. This is approaching the stern where it rounds off.

Q Now, does that plan indicate, and if it doesn't you tell us that, the exact or approximate height of this hatch coaming wall?

A It will show it somewhere, yes.

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Q If I may take the liberty, I'm not sure it is a critical fact in this case. Can you tell us the approximate height you would expect the hatch coaming to be?

A Between 36 to 42 inches.

Q About three to three and a half feet high?

A Yes.

Q All right, we will pass that. Now, we are looking down, as it is with, on the ship, not sidewards. That hatch has a certain width; right?

A Yes.

Q Number 5 hatch, what was its width?

A It is 21 feet wide and 27 feet 5 inches long.

Q Did you say any inches or was it just feet?

A 27 feet 5 inches long and 21 feet no inches wide.

Q Now we are over to the port side of the hatch, right?

A Yes.

Q And of course the same coaming and the same wall;, right?

A Yes.

Q Now, we are over to the area that's been mentioned throughout the course of the testimony in this case, the port side of the number 5 hatch, the offshore side.

A Yes.

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Q And can you tell me are the dimensions for the port side of that deck area the same or different than for the starboard side?

A Yes,they are.

Q The same?

A The same.

MR. LEONARD: Am I correct is 20 feet 8 inches?

THE WITNESS: 20 feet 8 inches from the hatch coaming to the beam at the forward end and 19 feet 10 inches at the after end.

MR. LEONARD: Thank you very much.

Q Now, if these containers were 8 feet in width, as it has been testified to, then of this either 20 feet 8 inches or 19 feet 10 inches, with two containers side by side, how much of this space would they occupy as a minimum?

A Well, 16 feet would be the cargo space butted up against each other, and approximately two feet on each side. A few inches less aft and a few inches more forward. But essentially that.

Q Even it was, so to speak, squarely placed or center spaced, there was less than two feet on each side?

A Well, two feet at one end and a little bit less than two feet at the other. Maybe two inches on each side.

Q Now, according to the evidence we had before us,

in this area there were what, some eight containers?

A There were eight containers but there would be two of them.

Q So a layer of four and a layer of four; is that right?

A Yes but as far as the hatch goes the 20-foot containers would go as far aft as possible and still the two containers that were forward of them would cover part of the hatch and after that is the deckhouse and the masthouse. It would extend beyond that.

Q I see. Because the hatch is only 27 feet and the length of this thing is 40 feet?

A Yes.

Q Now, what I have done, Captain, and you tell me if this is right because it is your testimony that counts, whether this is consistent with the testimony and the assumptions you made before; that we have four boxes alongside here, two tiers, so that one is sitting on top of five, the way I have used the numbers, and two is sitting on top of six, three on top of seven and four on top of eight. We will use the initial numb[illegible]s the top tier. All right?

A Yes, but there is one slight difference. There is still a little room to make the boxes go a couple of feet farther aft of the hatch itself, closer to the after poop deck.

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Q I am going to ask you to understand, Captain, with the Court's permission, that I have not intended this to be to scale. You have all seen me drawing it. Indeed I am not intending to represent or present it as to what distance there was between the two boxes, if any, and to what extent they extended forward of the end of the hatch but just very generally as to the location of the eight containers in this area, just very generally in those terms. That is the use of the drawing I have made.

MR. KAIN: May we note for the record, your Honor, it is defendant's position as of now there is no testimony in this record as to precisely how these --

THE COURT: I think that is right. I understand that.

MR. KAIN: Nec essarily this has to be general and cannot depict the situation as it existed.

MR. FRIEDMAN: Fine, I agree with that.

Q Now, question number 1, Captain, do you understand that this is the inshore side and this is the pier (indicating)

A Yes.

Q Now, when these containers were to be lifted-- withdrawn.

When these containers were to be offloaded, in what direction, you tell us, how were they to be lifted and

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moved? Would you explain to us the direction of the movement to effect that purpose, of offloading them from the ship and getting them down to the pier, whether onto the bed of the truck or a railroad car or what have you?

A They would have to be moved from the position where it is, and that would be the after one that I think you have marked number 4, clear across the deck, over the hatch, over the other cargo, if any, and then onto the dock.

Q Of course, on this sketch we can't show the lifting aspect; right?

A Yes.

Q That's the first step?

A Yes. This is looking down from the top.

Q After it has been lifted up, then is the direction in the way I have just moved (indicating)?

A Exactly as you have shown it.

Q And I will just do that to indicate that movement (indicating).

A Right.

Q Now, plane of the fall, did we hear that term the other day?

A Yes.

Q What is the plane of the fall, Captain?

A That's the horizontal plane that would go through the

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direction that the falls will travel with the load from one block ahead of the boom to the dock of the house fall. That would be the point.

Q In the circumstances --

MR. LEONARD: Just for clarity, I know the captain said horizontal but he indicated vertical.

THE WITNESS: The whole thing moves across deck. Plane would be a vertical plane moving in a horizontal direction.

Q I want you to tell me, it is this space occupied by this box, its size, 20 by 8 by 8, as it is moving across?

A Yes.

Q All that air space that it is moving through to get to the inshore side?

A That's correct.

Q Now --

THE COURT: I think you told us something different. I asked you about that Friday and you told me it was the plane made of three points: one, the two -- I had a picture Friday but I don't have it and I have been pleading for a pictu and nobody will give us one. But anyway, there is a triangle, isn't there?

THE WITNESS: Yes.

THE COURT: And there are two upper ends of the

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triangle consisting of things which presumably some day in this trial we will see pictures of, and then there is the point where some lines go down and meet so that they can hold this cargo?

THE WITNESS: Yes.

THE COURT: And you have three points, and you told me it was the plane made up of those three points.

THE WITNESS: But it moves in a horizontal --

THE COURT: I don't care how it moves. It is plane consisting of those three points?

THE WITNESSS: Yes.

THE COURT: Any different?

THE WITNESS: No.

THE COURT: It isn't made up of the space occupied by the box. That isn't what you told me Friday and what you are telling me now.

THE WITNESS: I am talking about the plane of the falls, that's the wires that are carrying the load.

THE COURT: All right.

Q What is the term that is used for the air space that is going to be, so to speak, consumed or occupied during the course of the movement of the container from its position on the vessel to off the vessel? Is there a term for that?

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A None that I know of. This is the open space through which it will move. It doesn't matter whether it is a small package or a big package, as long as you have the plane of the falls that's the direction it is going to move.

Q Explain to me the relationship between the term and the definition as you have just given it to his Honor, of the term plane of the fall, and the space occupied by the cargo in its movement, the relationship of those two consents?

A It is the plane, p-l-a-n-e, the area it will go t hrough.

Q To be frank, I am back where his Honor asked you the question --

THE COURT: I see no point in going through this unless we have some pictures. When somebody gets some pictures we will go to it. Otherwise we will spend hours in inconclusive discussions about this. I have a book in the robing room on modern seamanship if anybody wants to use it.

MR. FRIEDMAN: I will be happy to use it.

(Pause)

THE COURT: I am referring to page 172. It is a picture which is called "house fall rig." Obviously it refers to naval warships but I would think it would be

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at least until something better is produced, it will illustrate some of the basic points.Let's see if we can use that. That's "Knight's Modern Seamanshi ."

Q I will put a clip on page 92 and so we will have an opportunity to mark it.

Can you tell us first, to deal with the threshold question, that picture of certain cargo handling equipment, does it fairly and generally provide a basis for explaining the equipment that was used for the handling of the cargo on the Concordia Viking?

A Yes, it explains it but it can also complicate it. The ammunition ship, from which they are transporting ammunition over to the battle ship, would be the same as it was the pier and they were transferring cargo from .ne ship to the pier. The rig, the principle is the same.

THE COURT: In other words, it shows those three points, the plane of the falls, and so forth, doesn't it, pretty much.

THE WITNESS: Yes.

Q Lightly, so we can erase it at a later time because it is a library book --

A There is the triangle. It is very plain. In this case the ammunition ship is the warehouse. That's fixed. They are transferring from one ship to the other. This is

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the house fall (indicating).

Q I think we can describe it on the record and then with the court's permission show the cut to the jury.

The triangle that you are referring to has as its base the upper horizontal line, an upside down triangle; the top of the triangle is called here the outboard transfer whip and then you can see a line down, almost directly down, just a slight angle, and another line up at a more severe angle, and that's the plane of the fall directly beneath which carried the load which you described to his Honor.

A Yes.

MR. FRIEDMAN: I ask permission to show it to the jury.

THE COURT: Yes. Ladies and gentlemen, what this does, at least temporarily will show you what, frankly, I was anxious to see Friday; that is, just the basic arrangement of having a boom on the ship and then what they call the falls which hook to the structure on a dock and how they use that basically to transfer cargo from the ship to the dock. You will see the basic arrangement and I'm sure we will have something a little more precise later on. This is good enough for present purposes.

We will call this Exhibit 13 and we will get a Xerox copy.

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xx (Plaintiff's Exhibit 13 is received in evidence.)

Q One question before we pass the cut, and that is this, Captain --

MR. LEONARD: I haven't seen it.

MR. FRIEDMAN: I will show it to you (handing).

Q As the gentlemen are looking at it, Captain Ash, while not necessarily exactly as is shown in that cut, in the Concordia Viking, the Picinich situation, there, too, from the evidence that you have heard the very end of this rig as it met the cargo, were there four hooks, corner hooks to each of the top surface and the four corners?

A Yes.

MR. FRIEDMAN: May I pass this to the jury?

THE COURT: Please do.

(Pause)

MR. KAIN: Your Honor please, may we note for the record that although this exhibit illustrates the principle of a house fall, it is certainly not the same rig as we have been discussing here.

THE COURT: I am sure we will have to get it more refined later on.

Q Coming back, if I may, Captain, to the onloading procedure in Saudi Arabia in this case, passing the matter of using the stacking device, for the purposes of conducting

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the ocean voyage from Saudi Arabia, I think there is some testimony about $11,000,in any event a considerable distance to the port of New York at Hoboken. Now, did the various deck containers, container cargoes, have to be lashed to the deck?

A Yes.

Q And in that connection did that involve, or in terms of what proper practice called for, the use of the padeyes that you testified to this morning?

A Yes.

Q And did it also or should it under proper practice have involved certain wire roping and what has been referring to as turnbuckles?

A Yes.

THE COURT: I have an awful feeling we are starting all over.

MR. FRIEDMAN: We are not, your Honor.

THE COURT: This was gone into on cross, it was gone into very thoroughly on direct.

MR. FRIEDMAN: I am just laying a foundation to offer something your Honor wishes in evidence.

THE COURT: We have had this man on the stand a long time and let's finish up.

Q Have you seen here in court since Thursday a

turnbuckle and connecting equipment of the type you were describing in words in your evidence Thursday and today?

A Yes.

Q Is this the item that we are going to offer that you have seen before, is that an example, just as the padeye and the stacking device, an example of the type of equipment that is used for that purpose under ordinary and proper practice?

A This turnbuckle is a standard type of turnbuckle. The yoke may be different, the ends may be different but it is used for lashing deck cargoes or cargoes in a hold. One side is a left-hand thread, the other side is a right-hand thread.

THE COURT: Is it a turnbuckle?

THE WITNESS: Yes.

THE COURT: You offer it?

MR. FRIEDMAN: Yes.

THE COURT: It is received.

(Plaintiff's Exhibit 14 is received in evidence.)

MR. HELLER: It is a lashing gear that just came off a ship.

MR. LEONARD: Your Honor, I object if Mr. Heller is going to testify.

THE COURT: Please. This is obvious.

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Q Now, Captain, sort of briefly but enough so that we as landlubbers can understand. First of all, do I have it right side up in terms of its use on a ship?

A It could be used either way but as far as lashings go, the bottom has a shackle on it and that would go on the padeye on the deck or on the bulwark or the coaming.

Q This piece that I have in my hand, is that called a shackle?

A That's right, that is a shackle.

Now, on the other end you have lashing wire with wire rope clamps, which, incidentally, are not on properly.

Q Now, let me ask you a question on that. These items I am holding in my fingers, that have the nuts attached to them, are they adjustable or are they a permanent position?

A Oh, they are removable. They are a temporary application which is very practical in wide use.

Q So by the use of these items you control the length of the wire rope you want to apply?

A Yes.

Q And this wire rope is bendable, flexible?

A It is flexible.

Q Now, when this wire rope, at this end, the high end, is put through or attached, how does that affect it?

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A Well, when it is rolled through it has to come down and be fastened to something else.

Q And when it comes through and comes back, is one of these kinds of clamps employed to hold it in its place?

A Yes.

Q Now, the shackle is in the padeye, that's the way it is being used?

A Yes.

Q In order to make it tight so it has a securing effect during the course of an ocean voyage, how is that accomplished?

A Well, one of the screws is a right-hand thread, the other one is a left-hand thread. When you turn the middle yoke it either expands it or draws them together. Obviously, you have to have it loose to make it fast and attach it. Then they put a bar in it and turn it and turn it until it gets real taught.

THE COURT: In other words, when you turn the turnbuckle --

THE WITNESS: The yoke.

THE COURT: You tighten it?

THE WITNESS: Yes.

Q When you talked the other day about a ship's crew or mate going by and sort of hitting the various items to

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see whether they are taught, and if they are not, tightening them up, we are referring particularly to this piece (indicating)?

A Yes. That's the unit that you use to tighten or slack.

Q Now, with respect to the Picinich situation on the Concorida Viking, sir, these lashings,as you understand the evidence, were connected to the cargo containers on the ship in what way, through what means were they attached?

A Well, from the description that was given to me the wire was passed through the corner fittings and brought down to where it could be brought together. In other words, those clamps would be taken off and the two ends put together. Then the bottom shackled to the padeye on the deck and then taut and that would hold it down tight.

Q Now, Captain Ash, I want you to assume that in the circumstances of this case, number 1, some of the lashings were applied either to the top or over the top of the second tierr containers. I want you to assume further that all of the lashings, wherever they were attached, were, so to speak, pre-released by the ship's crew before the stevedores started their procedures.

Now, I want to deal with that, the release of the deck lashings. Deck lashings serve the purpose of holding

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the container cargo in place during the course of the ocean voyage?

A Oh, yes.

Q Now, when it comes time to offload, once the deck lashings are released so that they are no longer tight, even if they are slacked or removed, either way. If no stacking devices have been employed between the first and second tier containers, what, if anything, is holding the boxes in their places?

A Nothing. Only their own weight.

Q Now, you asked some questions the other day about procedures and the port of New York as to what the unions permit or don't permit as to men working together. Do you recall that?

A Yes.

Q I want to focus on that. When a foreign vessel, foreign flag vessel arrives in the port of New York, Hoboken pier or otherwise, and assume, if you will, that the crew is sufficiently and appropriately trained and the ship owner wanted his men, the ship's crew only, to do everything with respect to getting the deck container cargo off the ship and onto the pier, including, therefore, operating the winches, lifting, bringing them across and lowering; is that a procedure that the regulations and practice of the

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port of New York, Hoboken pier, permit?

A Not completely.

Q I am not asking you that. Could the ship's crew operate the booms, the winches and do the entire offloading themselves?

A Nc.

Q Now, let's back up to the other end. A foreign flag vessel is coming into the port of New York. It reaches Sandy Hook and it has hatches. Let's assume that it is a vesse that doesn't have the mechanical hatch openings, you just press a button and they roll back, but the hatch covers have to be removed, and there are many vessels like that; right?

A Yes.

Q That's necessary for the offloading procedure; correct?

A Or loading.

Q Loading, yes. Let's talk about the offloading. Does the ship's owner have to await the contract stevedores and their employees to open the hatches or can ship's crew perform that work under whatever their wages and terms are with the ship?

MR. KAIN: If your Honor please, I object to this line of testimony unless a foundation is laid to establish

that Captain Ash has the necessary knowledge as to what the union agreements are.

THE COURT: Sustained.

Q Captain, as part of your experience you mentioned being port master, port captain for various vessels. That phrase has been mentioned but you never told us what that means. What does that mean?

A Do you mean the port relief officer?

Q Whatever it was. You told us some of your experience involved being port mate, port master for different vessels.

A Yes.

Q What does that mean?

A It means I come aboard the ship and take charge in relieving the ship's officers. But that's only on merchant ships.

Q And in the course of that are those time periods during which, quite often, onloading or offloading procedures are occurring?

A Yes.

Q So that from your own personal experience have you observed onloading and offloading procedures here in the port of New York on numerous occasions?

A Yes.

Q In terms of the practice my question to you is,

does the opening up of the hatches, the removal of the hatch boards, the hatch covers, something that is universally performed by stevedoring employees, universally performed by ship's crew or in some cases one and in some cases another, you tell us?

MR. KAIN: I object to the universality of counsel's questions. If he is asking the captain what his own experience is when he has been there, I have no objection to that.

THE COURT: Yes.

Q Yes, what has been your experience?

A It has been my experience in the port of New York and other ports the crew may open the hatches, get ready for discharge of cargo but not in conjunction with the longshoremen. They may bring the ship alongside the dock or open it alongside the dock before the stevedores come aboard; they may open the hatches. They may not spot the booms for cargo but they raise the gear and have both booms up for the stevedores to start to use.

Now, in all the foreign ports, particularly European ports, even the American ships over there open the hatches because the custom of the longshoremen there is they do not open the hatches.

Q Let me come to the port I want to ask about. In the

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port of New York, including the Hoboken piers, are there employed from time to time -- by that I mean that the ship owner is paying the stevedoring corporation for the time and use of these men, whatever fees are involved -- are there employed what is known as lasher gangs?

A Yes, of course.

Q Would you tell us what is referred to in my question and your answer by the term lashing gangs?

A Lashers or lashing gangs are longshoremen who are employed for the purpose of removing lashings or putting on lashings to secure the gear. They are longshoremen.

MR. KAIN: I object to the relevancy of this, your Honor, unless there is something established that there were lashers employed in this instance.

THE COURT: Overruled.

Q And from the testimony that you have assumed that has been presented to you in this case, did the ship owner employ lasher gangs, lashers of the stevedoring corporation to do that work?

MR. KAIN: If your Honor please, I assume that's something Captain Ash couldn't possible know unless somebody told him. There has been no testimony.

THE COURT: That's right.

MR. FRIEDMAN: I would like to offer in evidence

or have the record indicate there is in evidence Exhibits 8 and 9, which your Honor has already ruled on.

THE COURT: We have one more question on those and we will take our recess now. I will then speak to the lawyers.

(Jury leaves.)

THE COURT: I just wanted to make sure of this so there wasn't any confusion. In your memorandum,Mr. Leonard, you do refer, I guess at the beginning of page 8 to the idea that this exhibit or these exhibits, which we have now marked 8 and 9, these represent at position contrary to the testimony of the plaintiff.

MR. FRIEDMAN: Yes, your Honor.

THE COURT: I think the way you have used that idea in your memorandum is to assist your argument about the unrealiability of the reports; right?

MR. LEONARD: Yes, your Honor.

THE COURT: I take it there is nothing formally barring a claim based on reports. Do you get my point? There is no pre-trial order limiting the claims or defining the claims in such a way, and I am referring, of course, to the claims of the plaintiff. There is nothing defining the claims of the plaintiff so as to exclude claims based on 8 and 9? I don't have anything but I don't want to

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have that lurching.

MR. LEONARD: I would respectfully direct the Court's attention to the opening by Mr. Heller which was reported, wherein certain claims were made against the ship owner. Those claims, as I heard them, did not include any reference to any bumping or striking. So that to that extent, at least as far as a formal claim goes, there is no basis for it.

THE COURT: Does that bar it?

MR. LEONARD: I would urge it does, but that's within the Court's discretion as to what constitutes a formal claim by the plaintiff and what does not.

THE COURT: As long as we have started in on this, it does seem to me, Mr. Friedman, that plaintiff testified, and I have gone over my notes in the last few minutes, the plaintiff testified and the eyewitness that the plaintiff brought in also testified as to a particular version of the facts; namely, that, let's call it, container number 1 was lifted up, it scraped and when it was clear, then container number 2 moved sideways towards the hatch coaming. It was that movement which dislodged the plaintiff.

Now, you have, I think, taken the position that there were elements of unseaworthiness basically in not having the plates to prevent sidewise movement. You have taken

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the position that, in one way or another, that that container number 2 wasn't secured against sidewise movement; right?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: Now, maybe this was not articulated earlier, but certainly in your questioning of Captain Ash you brought out the idea, I believe, that having the loose lashings or partly loose lashings still on board on top of that container, that wasn't a very good thing.

Now, the inconsistency arises in my mind and I find it difficult to reconcile the testimony of the plaintiff, if that is the version you are going to the jury on, the version which would be represented by the stevedores, the McGrath reports. I don't think anybody has really advanced any formal reason why you can't go to the jury on a new theory. I guess there wasn't any pre-trial order where you crystallized or specified your theories. Nobody has shown me any authority that binds you by means of an opening statement or any of that. But still I am a little confused.

MR. FRIEDMAN: May I speak to that, Judge? I don't think it is confusing. In the first place I handed up, not informal but I think your Honor has it, copies of a number of cases from another brief in which the version of the accident theory of litigation is totally discredited and removed. That is as the evidence unfolds, the two

contrary versions, and they may be implaccably opposed, if both of them lead to separate liability the plaintiff is not barred from recovery because he advanced one and the other is believed. If two under the appropriate law and rules of law would give rise to recovery and compensation for the injuries sustained. So that is aspect number 1.

Aspect number 2 with respect to this case is this, your Honor: I certainly respect the Court's curiosity, and I don't mean that term in a demeaning way, in knowing why the container moved. If I may say, your Honor, here we are sitting in court very studiously examining something that took place both suddenly and unexpectedly and was not being watched for at the time it took place. We are now examining it in hindsight. The fact that the plaintiff is not precisely aware, or even an eyewitness, as to what caused the box to move is not the critical question.

THE COURT: I don't think that's the question. The question is whether it did move. And the lack of a cause--the proof or lack of proof as to a cause would be circumstantial evidence as to whether it did or did not move. Some evidence.

MR. FRIEDMAN: I couldn't be in more agreement with your Honor. That is precisely why I feel that the jury is entitled to have before it such evidence as exists

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as to why it moved. Because even though, and we are submitting a brief on it, we don't believe that is the critical legal question. We recognize that the operation of the mind as to be persuaded whether in fact it did move, is going to be influenced by having some explanation as to why it moved. If somebody is contending that it did move. Eve though we have no legal obligation to prove why it moved, provided the jury is satisfied that it did move. But as a pragmatic aspect, and your Honor was the first, unfortunatel by indicating his concern with the question, we became more concerned than just reading the cases. If you read the cold cases I can cite here and not be concerned with the question at all. In human form I should be to protect my client's interest be concerned with the questions.

So such evidence as to why it exists as to why it moved is appropriately presented.

For what it is worth, and maybe they will make a big argument on it, as to one man using the term scrape, another using the term bump or hit, and all they want to extract from those differences in wordage, they are entitled to argue about.

THE COURT: The plaintiff argued categorically that container 2 did not move while container number 1 was going up.

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MR. FRIEDMAN: Let me explain our theory. While Container 1, actually in the way we have laid it out on the blackboard, it is number four that is being lifted --

THE COURT: Let's have our terms the same. We have really talked about the first containers that he was standing on, and that was hooked up and being moved. I will call that container #1 for our discussion, right now.

Container #2 he went onto and was doing some work at the time he fell.

MR. FRIEDMAN: Judge, so long as container #1 occupied any, at least, substantial portion of that cube, that air space which the first occupied entirely; as it is being lifted it is occupying less and less of it. So long as it is occupying that space then the container next to it, even though it has been bumped or hit or scraped, even though it is unstable becuase of its lack of both stacking devices or deck lashings, it cannot move because there is something else in the space to which it would move. And then having being now rendered unstable and jarred loose, the lifted container clears the air, and then it moves.

That to me is clear. If I don't convince the Court of that,then I am quite concerned I won't convince six or seven jurors of it, but I fail to understand why that's not clear.

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THE COURT: I think this is a jury question and I have no intention of interfering with their prerogative on that. I am extremely interested in the facts because I am sitting here and ultimately I have to instruct the jury and I have to understand your theories and I have to understand the defense theories. But I guess we won't try to argue it.

Anyway, I will admit, and I will confirm and you can use 8 and 9 before the jury after the recess.

MR. LEONARD: Before you go, your Honor, in answer to your question as to formal claims, I would like the Court to deem as Court's Exhibits, the supplemental pretrial memorandum of the plaintiff and the supplemental answers to interrogatories given by the plaintiff, particularly item 6 of those supplemental answers and item 4 of the supplemental -- I'm sorry, pretrial memorandum.

THE COURT: Let's have those marked as your exhibits. Then the record will be clear.

mR. LEONARD: Thank you, your Honor.

THE COURT: That's just the next defendant's exhibit, whatever the letter would be.

MR. LEONARD: Third party exhibits.

THE COURT: Can't we have just a series of defendant's exhibits?

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MR. LEONARD: It doesn't matter to me, your Honor.

THE COURT: The next defendant's exhibit.

(Defendant's Exhibits I and J were marked for identification.)

THE COURT: Now, what are you referring to in the pretrial memorandum?

MR. LEONARD: Item Roman numeral IV, which describes the plaintiff's contentions. The markings on that of course, were put on by me. They are not part of the original document.

THE COURT: I don't want to prolong this, but I don't see anything in the exhibits, 8 and 9, which are inconsistent with these rather general theories espoused in the exhibits I and J, which you have shown me.

Now, was there one other thing?

MR. FRIEDMAN: You wanted to ask Mr. Leonard, it is my understanding, 8, 9 and 10, were not provided to Mr. Heller, plaintiff's counsel, until on or about September 30, 1975. If I am incorrect as to that, I would like to be corrected.

MR. LEONARD: I cannot accept that characterization. During the course of the testimony of Mr. Tomaino and examination before trial in 1974, Mr. Heller was made

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aware of the contents of Mr. Tomaino's report and indeed questioned him.

MR. FRIEDMAN: The report was not given to us. It was withheld.

MR. LEONARD: That's exactly the inference I want to avoid, your Honor.

THE COURT: Where do we stand? Were they made available to plaintiff or not?

MR. FRIEDMAN: Not until September 30, 1975.

MR. LEONARD: He asked Tomaino questions based upon that exhibit at the examination before trial.

THE COURT: He had the exhibit at the deposition?

MR. LEONARD: I have the transcript right here.

THE COURT: I don't think it's worth getting into. I will have marked as a Court Exhibit the memorandum of Mr. Leonard submitted this morning, Court's Exhibit A, which outlines his position on these exhibits. We alluded to that memorandum in our argument but I think it should be marked please, and then we will take a recess.

xxx (Court's Exhibit A marked.)

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(In open court- jury present.)

MR. LEONARD: I would request a short side bar conference.

(At the side bar.)

MR. LEONARD: I want the record to indicate that the third party defendant served its verified answers to interrogatories upon Mr. Kenneth Heller on January 2, 1975. Attached to those verified answers to interrogatories was a copy of the claim report signed by Mr. Tomaino, which has now been introduced in evidence as Exhibit 9.

THE COURT: Now, what was the date of the plaintiff's answers to interrogatories? I guess it is J. Can you get that? Have you got that, Mr. Leonard?

MR. LEONARD: Yes, I have them. It is dated November 7, 1973.

THE COURT: I think that plaintiff's answers are sufficiently general. I don't see any conflict.

I am not going to get into it any further.

You may use 8 and 9.

(In open court.)

THE COURT: Let the record show we discussed this before we got together with the jury, Plaintiff's 8, 9 and 10. I will have the clerk marke and we will have the record again show that 8 and 9 are received and 10 is still

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marked for identification.

MR. FRIEDMAN: Except there is one modification Counsel and I have agreed we will mark in evidence 9A, which is a Xerox copy of 9 for identification.

THE COURT: That's fine. So 9A will go into evidence and 9 will not go into evidence; is that right?

MR. LEONARD: 9 remains in evidence for purposes not concerned with the jury, your Honor.

MR. FRIEDMAN: It is part of the record, I think is what Mr. Leonard means.

THE COURT: That's fine.

(Plaintiff's Exhibits 9, 9A and 8 are received in evidence.)

MR. FRIEDMAN: Judge, there aren't enough copies to give everybody a copy, so may I read it to the jury? Is that all right?

THE COURT: Yes.

(Counsel reads Plaintiff's Exhibit 8 in evidence to the jury.)

BY MR. FRIEDMAN:

Q Now, Captain Ash, with respect to the removal of the lashings by the ship's crew, can you tell us, sir, if it is performed that way by the ship's crew? Is that done hand in hand with the stevedores who are doing the off loading

or at some time separate and sooner.

A It has to be done before and not in conjunction with the longshoremen.

Q And if it's done that way, that means the ship owner doesn't have to pay the stevedore for the use of the lashing gang?

THE COURT: I'm confused. I thought you told us the other day that what should be done is have the ship's crew stand there and loosen these things practically immediately before the stevedores did their work to lift up the boxes. Isn't that what you told us?

THE WITNESS: Your Honor, I said they should be removed just prior to moving the box. But the ship's crew --

THE COURT: You used the word "immediate," didn't you?

THE WITNESS: Yes.

THE COURT: What's the story now?

THE WITNESS: It is customary to use lashing gangs of longshoremen, 1, 2, 4. They use them all over the ship, they use a few at each hatch. They can work with the longshoremen and do that. The ship's crew cannot work with the longshoremen.

Q So in order to follow what you say, is it

proper and safe practice of the simultaneous or hand in hand working that you have already described, the men who are going to do the releasing of the lashings have to be larger gang stevedores; right?

A Yes.

Q Because under the union regulations in the Port ofNew York the off loading longshoremen will only work hand in hand with other longshoremen; right?

A Yes.

THE COURT: Wait a minute.

MR. FRIEDMAN: It's not clear?

THE COURT: I asked you and Mr. Kain asked you, but I asked you if you knew about longshoremen regulations and you weren't able to answer me.

THE WITNESS: Yes, I was. He said I was not qualified to.

THE COURT: It seems to me we are starting the direct over. We are well into this trial and it seems to me that we are starting the direct over and we have gotten new elements that should have been brought out on direct. I find it very inefficient to proceed this way.

MR. FRIEDMAN: We are dealing directly as your Honor's last two questions indicated.

THE COURT: Not as my questions indicated.

Let's try to hurry things up and cover things that respond directly to the cross examination and not have simply a new set of direct questions.

MR. FRIEDMAN: Who brought in the matter of hand in hand working and who could work hand in hand with whom except Mr. Kain on cross examination. That's exactly what's being referred to.

THE COURT: The witness said he didn't know enough about the regulations to answer.

MR. FRIEDMAN: I'm really at a loss, your Honor

Q Captain Ash, if the ship's crew is directed to do that work in advance, does that reduce, leave the same, or increase the amounts of money that the ship owner pays the stevedoring corporation for the off loading work, all other things being equal?

MR. KAIN: If your Honor please, the contract again is in evidence. I submit no foundation has been laid for Captain Ash to testify as to the ship owners or the stevedores' cost at least in this case.

THE COURT: I don't see what difference it makes. I will allow the testimony. I don't think it really has any relevance.

A The ship owner saves money on anything he can have the crew do vis-a-vis anybody else, shore personnel of

any kind?

Q If he chooses to follow that route, what effect does that have in the Port of New York as to whether the release of the deck lashings are going to be accomplished simultaneously with the winchmen lifting off the strain or some time in advance.

A Well, obviously it has to be done before the longshoremen show up. It has to be done before.

Q Now, can you tell me this with respect to lashings while we are on them:

If under the report that was just read there were some deck lashings left by the ship's crew, two wire lashings were still secured to the uppermost outboard container at the number 5 hatch, and you have heard the evidence that Picinich and another man went up to deal with those lashings on the top of the containers; right?

A Yes.

Q Now, my question to you is, if the deck lashing procedure that is shown in Exhibit 5 -- I know this is a copy of Exhibit 5 and I will find the marked one in a moment.

Indeed, on the marked copy you drew an arrow on. Were they with slack, or loose, or taut, would there have been deck lashings up on top of the second tier container?

A No, there would not have been if the stacking plates and bottom plates were in use; it wouldn't have been necessary to go up high.

Q Now, would it still have been necessary in order to perform the off loading, to fit I think you called them the spreader hooks, the hooks from the spreader, into the four upper corners of the box in order to lift it off?

MR. LEONARD: I object. This is clearly beyond the bounds of redirect examination.

THE COURT: Let me hear the question.

(Question read.)

THE COURT: I will overrule the objection.

A It could be done from ladders, just hooking them in, without going on top.

Q So in short, Captain Ash, if that procedure had been followed, would it have been necessary for anybody to be up on top of the second tier containers?

A No, it would not.

Q Now, Captain Ash, there has been reference during the cross examination by Mr. Kain, or was represented that there were some 76 cargo containers being carried by the Concordia Viking on this particular voyage.

Now, assuming that to be so, sir, what does that indicate with respect to whether that ship handling that

cargo in that number, in the ordinary and proper practice should be on board ship when it arrives at Saudi Arabia or any other port, with a sufficient number of stacking devices to take on container cargo?

A It indicates to me that this is not the occasional picking up of a container. Such a quantity of containers would cover most of the available deck space on the ship and would call for the proper lashing gear for containers:

Quick release tensioners, quick release turn buckles, deck stacking plates and tier stacking plates.

Q Now, when a box of this size is being lifted by the equipment involved, and you told us that to some extent the picture that was marked as Exhibit 13 did give some indication of the way this thing would be hanging in being lifted; is that right?

A Yes.

Q Can you tell me whether, assuming that as a second tier cargo container is being lifted, has begun to be lifted, and let's treat it as number 4 in the sketch that has been put on the blackboard. That is the inboard aft second tier container, is that correct?

A Yes.

Q When this kind of situation is at hand, assume,

if you would, that in the lift-off there is a bumping or hitting by the number 4 box against the 3 box. My question to you is, can you tell me whether that fact, so to speak, alone, means that the longshoremen, the winch operator, any of those men, performed that lift-off improperly or negligently?

MR. KAIN: It doesn't lay a sufficient foundation. I object.

THE COURT: Sustained.

Q By the way, when on loading is being conducted, it has to be done with a view to the method of conducting the off loading; right?

A Correct.

Q Also with a view to it being carried safely across on the voyage?

A Yes.

Q Now, assume, if you will, that there is this camber that Mr. Kain questioned you about on the number 5 hatch; that is, that slight angle leading outboard; correct?

A Yes.

Q Now, what is the usual and proper procedure to be followed with respect -- in particular, with respect to the most outboard containers, the ones that are going to be closest, as it were, to the water, during the ocean

voyage when they are placed on top of the containers immediately below them? I am going to ask you to assume one other aspect, that on this particular occasion, whether it is proper or not proper practice, they did not use and did not have stacking devices. Do you follow me?

A Yes.

Q 1 and 3 are placed on top of 5 and 7 in Saudi Arabia for a long ocean voyage without stacking devices.

Now, what is the usual and proper practice with respect to dunnage or anything else underneath between 1 and 3 and 5 and 7, underneath.

A They would use sufficient dunnage to overcome the angle of tilt or camber to make it perfectly horizontal and at right angles to the vertical by building up. And the tendency is to tow it a little bit in so that the rolling of the ship would not have the tendency to strain the lashings off the ship, but rather inward to the ship.

Q Will you explain why towing in rather than towing out?

A Well, to overcome the camber which is sloped outward. You put the dunnage under it so that you will eliminate that slope and raise it up so that if there is any movement it would be inboard and not outboard.

Q Now, if that cargo, if I may use the term,

gets in trouble or insecure during the ocean voyage and should in any way, if it tips out where is it going?

A It would go overboard.

Q If it tips in is it still on the ship?

A Yes.

Q Now, my question is, sir, assuming on the Concordia Viking these container boxes or these 20x8x8 containers, eight boxes back on the port side of number 5 hatch, two groups of four, one on top of the other. If the Court will permit, without repeating in words all of the descriptions of the detail of the house fall, the boom. Assuming all of that which you have previously testified and described in your testimony as to the lay out of the rig and the falls and the spreader and the hooks and the height of the boom, and all of that I will ask you this:

If, as this number 4 inboard aft container, second tier container, is lifted there is a bump or hit against number 3, can you tell me, and let me put the question this way, whether that is something under ordinary reasonable stevedoring operations is a contemplated aspect of the operation or an unusual aspect of the operation or whatever words you see fit to describe it in?

MR. KAIN: I have an objection, not only because the details of the question didn't state what the

captain was asked to assume, but also because there is no testimony to back up the question in the record.

THE COURT: You mean about the bump?

MR. KAIN: Yes.

THE COURT: I will overrule that.

If you can answer that, Captain, go ahead and answer.

MR. LEONARD: I object, your Honor, on the ground that the st vedore is not a defendant in this accident. If this question is designedto elicit some claim of fault against the stevedore, it is not proper and not properly before this Court.

THE COURT: What about that?

MR. FRIEDMAN: Your Honor, it is designed to elicit facts in illumination as to what occurred in the course of the stevedoring procedure.

THE COURT: I think it could be confusing. I will sustain Mr. Leonard's objection. It is true that you should be aware of at all times that this action you're trying, ladies and gentlemen, is solely against the ship owner. You must be considering whether there was any negligence on the part of the ship's personnel and whether there was any unseaworthy condition of the ship or the cargo.

But as far as the pure question of whether there was some carelessness on the part of a stevedoring employee, particularly the winch operator here, causing a bump --

MR. FRIEDMAN: That is not the purpose of the question. I just don't want to argue with you.

THE COURT: That is not a ground of liability against the ship owner. We don't want you to be confused about that.

I don't see any point to the question.

MR. FRIEDMAN: May I approach the bench on that?

THE COURT: No.

MR. FRIEDMAN: What?

THE COURT: What relevance is it?

MR. FRIEDMAN: Your Honor, I don't think there is any secret. I purport to tell the Court that I previously discussed the answer with Captain Ash and I expect the answer to be negative.

THE COURT: I think that is helpful and I will allow the question.

MR. FRIEDMAN: May we proceed more rapidly by understanding Captain Ash would have answered the way I indicated?

THE COURT: Is that your answer?

THE WITNESS: That would be my answer.

Q Now, sir, with the aspect, let me call it that, that lifting off a container of this size with this kind of rig and fall and these dimensions, that it is part of the procedure that a bump or hit may occur against the next container, what is called for by way of safe and proper practice with respect to the security, let's call it that, and the stability, I suppose, of the number 3 container right next to it, in proper and safe practice?

A If it is not secured with the proper stacking plates, then the lashings should not be released until they are ready to lift it.

Q Captain Ash, assume, if you will now, that this container was loaded, as you indicated, with the usual considerations of the inboard towing that you mentioned, two,three questions ago, I think, and I won't repeat it, in recognition of the ocean voyage.

Assume, however, that for whatever reason these containers were not loaded with the use of stacking devices between the first and second tiers. Assume for whatever reason the deck lashings that had been applied for the purpose of the ocean voyage had now been laid slack and released some period of time before the off loading started.

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And as number 4 was being lifted off through this whole rig there was a bump or hit as it was being lifted away, can you tell us what you would expect to occur with respect to the number 3 container on the sketch, the offshore aft container on the second tier?

MR. KAIN: If your Honor please, I have an objection to the hypothetical. The only testimony in this case is that of plaintiff and his fac. witness, both of whom testified that there was no bumping and that the container on which Mr. Picinich was purportedly standing at the time of this accident, did not move.

THE COURT: You will have to argue that to the jury. I will overrule that.

A The bumping could start the container that the man was standing on in motion.

Q Now, so long as the number 4 container occupied, and that is sort of a side view of the four containers and naturally there is another row behind it; okay?

A Yes.

Q We will assume that it the hatch (drawing). So it is the same direction but the side view now.

So this would be 4 and number 8 and number 3 and number 7.

Do I have it right?

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A That's right.

Q Now, as number 4 is being lifted off, so long as it is occupying -- the reason that it is not right I now realize is I have the short end -- I have these ends touching which they were not. I'm sorry.

You were told they were laid lengthwise on the deck; right?

A Yes.

Q Let me get that right now (drawing).

That is, I guess, at least a little better.

Now, Captain, we are talking about lifting off containers. Do these come together or is there a bar here?

A They come together to a common point where the hook is.

Q So that's the right way (indicating); is that correct?

A Yes.

Q Now, that goes way up there; right (indicating)?

A Yes.

Q Now, while number 4 is being lifted off, so long as it is occupying some or most of this space, that is as it was going up, even if the bump or hit should occur at the beginning as distinguished from when it was just about cleared, can number 3 move into the space that's in whole or

in part occupied by number 4?

THE COURT: I think we would know that.

In other words, is number 4, a 4,000 pound object, is sitting where number 4 is sitting, another 4,000 pound object is not going to move into its place. That really isn't the problem.

Let's not waste time. Have you anything more?

MR. FRIEDMAN: I'm very close to being finished.

THE COURT: Proceed.

Q Assume, if you will, as we now have learned, that there were 76 cargo containers on this vessel and that unloading operations were going on at most, if not all, of the hatches, 1, 2, 3, 4, and 5.

Now, what would be effect, if any, at 8 to 9 o'clock in the morning, with the stevedores unloading from all of the hatches the various cargo containers, using booms, house falls and those procedures, with respect to the position of that particular ship in the water?

A The effect would be that the inboard booms, that is the inshore booms, would be swung as far away from the center of the ship as possible, maybe even up against the rigging, and they would all be in the direction of the shore side, and that the movement of the ship would be a tendency to list in that direction. Maybe very slightly,

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but the tendency would be there to move in that direction.

Q So we are clear for the record, when you siad, "that direction," did you mean offshore or inshore?

A I said inshore.

Q The direction which I have drawn the arrow?

A Yes.

Q Captain Ash, assume that there were deck lashings left on top of the number 3 container and the number 4 container and that a longshoreman was directed by his immediate superior to go up on the top of these containers to get and remove those deck lashings.

Assume, without taking the Court's time to repeat it, all of the procedures with respect to the location of the containers, the manner in which they had been on loaded, without stacking devices --

MR. KAIN: If your Honor please, I have an objection.

My recollection is the testimony was there were no lashings remaining on number 4; that after it was hooked up, the lashings were on what was depicted on number 3 container in that sketch.

MR. FRIEDMAN: You're saying the deck lashings were on top of number 3?

MR. KAIN: Yes.

MR. FRIEDMAN: I won't stop to argue.

Q They were on number 3 instead of number 4. There were the deck lashings on top and he was told to go up there and get them. Assume all the other facts that I have given you in the last couple of questions as to the off loading procedure. Assume that the number 4 container was now to be lifted inshore, in the direction that we had before with the side of the piece of chalk, as reflected.

Can you tell me, sir, was there anything improper on his part in being on top of the number 3 container at the time that this procedure was going on? I'm talking about on his part.

A Not on his part.

MR. FRIEDMAN: That's all.

THE COURT: Mr. Kain, do you have any recross?

MR. KAIN: Yes.

MR. FRIEDMAN: May we have one moment, sir?

THE COURT: Yes.

(Pause.)

MR. FRIEDMAN: Thank you for your patience, your Honor. I'm sorry.

THE COURT: Mr. Kain, do you have any questions?

MR. KAIN: Yes, I have a few questions .

RECROSS EXAMINATION

BY MR. KAIN:

Q Captain Ash, is it your testimony that in the usual type of container corner casting the arrangement of the holes is the same on the upper and the lower castings.

A Yes.

Q They are positioned exactly the same way; is that your testimony?

A Yes.

Q Captain, this turn buckle and piece of wire marked Plaintiff's Exhibit 14 in evidence, could you tell me, Captain, is that wire preformed wire?

A Yes.

THE COURT: I didn't hear the question.

THE WITNESS: It looks it to me.

MR. KAIN: Pre-formed wire, if your Honor please.

THE COURT: All right.

Q Now, Captain, you were shown a ship's print and in answer to Mr. Friedman's question, you supplied certain measurements; is that correct?

A Yes.

Q And were those measurements -- did you mean to

state, Captain, those measurements were the actual measurements from the bulwark to the hatch coaming, twenty feet, eight inces from the bulwark to the hatch coaming?

A Yes. That's the way I read it.

Q Will you look at it again, Captain, and tell me if that is still your impression?

A (Reading) That's the way it looks like here.

Q Will you look down there and do you see the inset of that plan?

A I don't see anything --

Q Let me say, Captain, doesn't the plan indicate that this distance is from the stiffeners inside the bulwark to the stiffness alongside the hatch coaming?

A Yes.

Q It indicates this much clear deck space rather than the actual distance between the coaming and the ship's bulwark; isn't that so, Captain?

A Yes, that's right.

Q So these measurements, the actual distance you would add another maybe foot, foot and a half, is that correct?

A What is it?

Q I say to these measurements you would add another foot to a foot and a half on each side to take care

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of the space occupied by the stiffeners?

A I don't think it is quite that much, but I would say a foot, anyway.

Q Now, Captain, you were talking this morning about stacking plates.

Did the dry cargo ships on which you sailed in your experience, did you carry stacking plates?

A We did not carry containers.

Q You never carried containers on deck?

A Yes, I have carried containers on deck, but they were only one high.

Q Did you ever carry stacking plates?

A No.

Q Did you ever carry any of these pre-measured Peck & Hale gear, these things you were talking about?

A We never had that many containers.

Q Could you tell me, Captain, if you know, how many containers does a container ship usually carry?

A It could be anywhere from 300 to 1,000. We have some monsters now that carry 1,000 containers.

Q Now, isn't it true, Captain, that lashings are designed to secure cargo during the ocean voyage; they are not designed to play any part in the loading or the discharge of cargo; isn't that so, Captain?

A This is not completely so. There are special lashings for quick securing and quick removal of containers.

Q Now, let me ask you this, Captain:

You mentioned that because of the camber of the ship it would be necessary in your opinion for the loading stevedore to build up a section of the deck to take care of this; is that correct?

A No. I said that would be necessary if they didn't have the proper securing gear. For instance --

Q I thought you said, and correct me if I am wrong, if dunnage were placed under these containers, you would have to elevate or build up the outboard, the portion next to the rail, to take care of the camber, so that you would have a completely leveled space; isn't that so?

A Yes.

Q On which to lay these containers?

A Yes.

Q And you also said that it was preferable to use this type of a stacking plate instead of dunnage under the container but that this part would be missing?

A No. I said that was for the deck plate. On the deck it has to be secured to something fixed, either a girder that would stretch from the hatch coaming to the

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beam that could be secured, which would make it horizontal; or the stacking deck plate built up so that it would be perfectly horizontal, welded to the deck. This is what I said.

Q In your opinion, if I understand you correctly, in order to properly stow these containers it would be necessary to install girders so that the stacking plates were leveled, or it would be necessary to have something put on the deck which would build it up before you loaded the containers; is that correct?

A I said portable girders. There are lots of times if you weren't carrying containers you wouldn't need that obstruction or your decks. So you wouldn't afix it permanently. But you could have girders that would take from one side to the other, twenty feet apart, with your deck plate secured to it. This is one alternative.

Q And these girders in turn would have to be built up because the camber would effect the camber also; is that right?

A That would be the shape of them. They would be higher on one end --

Q Lower at one end and higher at the other; is that what you mean?

A Yes.

Q In essence, when we talk about containers, particularly empty containers, we are talking about a big 20x8x8 box, aren't we?

A Yes.

Q And in your experience, dry cargo ships you carried many large boxes of a similar size, did you not?

A Oh, yes.

Q Did you ever carry boxed tractors?

A I've carried boxed motors, boxed automobiles, I don't know that I have carried any tractors boxed.

Q You carried all kinds of vans, things of that sort, as deck cargo, have you not?

A Oh, yes. Airplane wings.

Q And are these cases, these boxes, boxed autos, boxed tractors, are they fitted with stacking plates?

A No.

Q They don't require stacking plates; is that your testimony?

A They require a different type of stowing. This is for -- and they are not stowed two high.

MR. FRIEDMAN: Excuse me, may the record be clear. That's "t-w-o"?

THE WITNESS: Yes.

Q Have you ever carried cases on deck stowed

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two high, boxed automobiles, boxed tractors, large cases of any kind of machinery?

A If they were it was rare. It was built up with shorings, blocking, chocking.

Q Do you have any knowledge as to whether these containers were chocked carefully?

A Only what you said. I heard you say it. Yesterday you asked me if they were chocked. That's the only knowledge I have.

Q Didn't you tell me in answer to my question a few days ago that it would have been proper stowage to put dunnage between these containers both under the bottom containers and between the two levels?

A In the absence of stacking plates, I said, yes.

Q Let me ask you this, Captain:

Is it your testimony now that if lashing gangs were employed -- I'm talking about stevedore lashing gangs now -- that the custom and practice in the Port of New York is for the stevedore lashing gangs to work right in with the longshoremen to unlash as the longshoremen raise?

A This happens frequently, but not as often as it should.

Q Let me just go back for a minute. Captain, you

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told me the other day in answer to one of my questions, that in your opinion it would be totally improper and would never happen to raise these containers up eight feet. I'm referring to this container here, raise it up eight feet until it cleared. Did you tell me that?

A Yes. I said I saw no purpose in raising it to such a purpose for discharge purposes.

Q And let me ask you, Captain, is it your testimony that it is not possible in stowage such as this to raise this number 4 containers without bumping this number 3 container?

A Yes. It is practically impossible with a box of that length and the type of winches and mode of power to raise it without it touching or bumping or swinging, because the ship is not stable and solid.

Q And in your opinion, Captain, assuming such a bumping or scraping as the number 4 container is raised, in your opinion, in what manner would this bumping or scraping cause number 3 to move suddently four to six feet inboard?

A I believe -- this is my opinion -- as they were picking it up and got it high enough, the forward end of the container struck on the back edge, the forward end of the number 3, and swung it around, making it come inboard.

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This is my opinion in view of all the descriptions I have been hearing about this accident.

Q Were you asked to assume this and have you given any testimony during the course of this trial, Captain?

A As I recall, even you told me it was four to six feet inboard, not as a solid thing, but four to six feet inboard. Now, if it is partially that it is not on a straight line, it is on an angle, I would say the six feet would be the after end and the four feet would be the forward end, because if it got struck on that end by a corner as it was going up, it did bump, it could swivel it right around that way.

Q Is it your testimony, if I understand you correctly, as number 4 is raised, if the forward end of number 4 hit the forward end of number 3, it would swivel around?

A It could do it. I didn't say surely it would, but I would say it could. You're giving me a hypothetical question and I'm answering it the best I can.

Q Assuming both these containers weighed two tons, would your answer still be the same?

A If there was dunnage underneath it, yes. If the stacking device was there, no.

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Q If the containers had dunnage between them, Captain, would that impede or would it enhance the possibility of slippage?

A I would say the dunnage would enhance the possibility of slippage.

Q And would you anticipate that this dunnage, if it had made the voyage between these two containers, that perhaps the weight of these containers had dented in this wood?

A It could. Depends what kind of dunnage

Q But in either event, you would say it would enhance the slippage? By that I take it the friction coefficient would be less with the dunnage between, is that correct, sir?

A Yes.

THE COURT: Do I understand that your idea of what you say the swivel would be for the forward end of number 4 to hit the forward end of number 3; right?

THE WITNESS: Yes.

THE COURT: And push that outboard?

THE WITNESS: Push it outboard enough that the inboard would slide, dragging the whole thing with it.

THE COURT: Wait a minute.

THE WITNESS: Could I show you with two books,

your Honor?

THE COURT: Any way you want to.

THE WITNESS: If I can have two books, I will give you exactly what I mean.

MR. FRIEDMAN: Are these two safe?

THE WITNESS: Yes.

What I mean, sir, is this:

We have two containers side by side. We bring it up and this end hits this end and it will come this way because of the weight and the fact that the ship has a small drag of a foot and a half. You see what I mean?

THE COURT: You have two motions. The first motion would be for the forward end of the outboard container to move outboard; right?

THE WITNESS: Slightly, yes.

THE COURT: Then it would move --

THE WITNESS: Down.

THE COURT: You're saying the second motion would be to have the outboard container move back; right?

THE WITNESS: Yes. This is my opinion. If it bumped like that, it would just knock this outboard container around like that and slide. It doesn't require much to start it.

Q Is it your testimony, Captain Ash, that it doesn't require to start 4,000 pounds in motion?

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A It depends entirely how it is tilted. If it is tilted in such a way that it is tender, a slight push will do it. If it is tilted the other way, a hard knock might do it.

Q You said this would cause container number 3 to slide downhill, Captain?

A Yes. I said it would slide downward and inward on the angle.

Q You don't mean it would slide downhill in the direction of container number 4 as shown here, do you?

A Yes, sure.

Q You're assuming that number 4 is clear of this area, are you, before it starts to slide?

A No. As it is going up it bumps it near the top. The corner of it bumps it and it is going to move number 3.

Q You are now assuming, if I take your answer correctly, that number 4 on this occasion was raised this eight feet which you told me was virtually impossible?

A I didn't say it was impossible. I said it was stupid and I didn't think so. But if they did, that's a very easy way to bump it.

Q That's what you're assuming now, that it did go up eight feet in your present assumption; is that correct?

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A I'm assuming that it bumped it in such a way that could make it move. And your description of eight feet, I will accept it.

Q Would you make the same assumption if that container had not been raised eight feet?

A It could still move it. It could bump it on the same corner at the same time it was being hauled away.

Q Let me ask you, Captain, you, I believe, in answer to the last questions of Mr. Friedman, you made some mention about the ship's booms causing an inshore list. Did you say that?

A No, I didn't say specifically it was only the booms. What I said is we have all the offshore booms somewhere within the limits of the ship. Not over the side. We have all the other booms that are not in use, where the housefall is pointing towards the dock. We have all the cargo going off the ship towards the dock. And it isn't at all difficult for three or four drafts going over at the same time to give the ship a small list, which as soon as they are landed, the ship comes back.

This is not a difficult thing. It happens frequently.

Q Let me see if I understand you, Captain.

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You're saying with this rig as we have had described, a housefall, a boom somewhere over here by the container. You're assuming similar rigs at the other ship's hatches, is that correct?

A Yes.

Q At least as of now you have no testimony before you as to what was going on in other hatches, do you?

A If they weren't using --

Q I'm just asking you your assumption.

You say on this assumption that the weight of these booms not in use -- did you make any reference to the inshore or starboard booms at these hatches?

A Yes, I did. I said if they are not in use or if they are all outboard, then the tendency to list in that direction would be very definite.

Q If the starboard booms are not in use, this creates a tendency of this ship to list toward starboard?

A No. I said if the booms were over there --

Q If they are starboard booms, isn't that where the heel is, on the starboard side?

A Yes.

Q You say that starboard booms not in use would create a tendency on the ship to list to starboard.

A No. I said it would enhance. After all, the

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boom only weighs two tons. So if all the booms were leaning, the most you would have is ten tons. Then on top of it, if three drafts of two tons each happen to be on that side, you could get a temporary small list. As soon as the loads were landed, the ship would come back.

Q Captain, if I have this as a boom pedestal and a boom going off in this fashion, is it your testimony the weight of this boom causes a list in this direction, with nothing on it?

A I said that all of these things together, not just the boom by itself, but the booms out and the loads going out simultaneously on that side, it could cause a small list, two degrees, two and a half, one and a half, but a list.

Q And in your opinion, would a list be caused using a housefall as it has been described to you here?

A Well, it is bound to pull the load weight in that direction from even the offshore boom.

Q Why is that, Captain?

A Because your movement weights are all inthat direction.

Q So if I have a heel block, which is what you would use, with a housefall; is that right, Captain?

A Yes.

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Q A heel block on the starboard boom?

A Yes.

Q Now, if the line of force is up here to a block on the pier shed and that's where the line of force would be, isn't it, Captain?

A No.

Q It wouldn't be?

A No. Take it from the housefall over to the weight.

Q Take it down here with the weight?

A That's right. As you bring the weight in that direction, the strain on the head of the boom and the weight will have a tendency to pull in that direction. And if, with a combination of the three booms or four booms or five booms, all in that direction, and the weights all going in that direction, you get --

Q Assuming this to be the container, Captain, is it your testimony that the line of force and the weight in this type of rig, where you go from your heel block in the starboard boom, back to shore, back here, this being the cargo fall from your offshore boom. Is it your testimony that the line of force is this way (indicating), causing a list in that ship?

A It can, yes.

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Q Is there any line of force tending to pull up this way?

A Of course.

Q In other words, in this direction (indicating)?

A Yes.

Q But in your opinion the force would be such, as depicted here, as to cause a list on this ship?

A I have said that the direction of the weight of all of the booms headed toward the direction of the [illegible], that the movement of two, three or four containers at the same time could cause a temporary list. That could cause container number 3 to slide with a bump.

Q Are you assuming this ship was tender, Captain?

A I'm not assuming any tenderness. I am talking about a practicality that exists on ships. This ship wasn't drawing that much water.

Q You know what I mean by the term "tender," don't you, Captain?

A Yes, I do.

Q Would you tell his Honor and the ladies and gentlemen of the jury what the term "tender ship" means?

A A tender ship is one that will list very easily and slowly in either direction from the vertical to the right. That's a tender ship. That is one that has most of

its weight in the bottom that will create that. Or if the weight is up high, and there is no weight in the bottom, you will get a movement.

Now, a tender ship is one that is just the opposite of the stiff ship. A stiff ship has a quick, violent rolling. A tender ship has a gentle, easy rolling.

Q And as of now, Captain, you don't know whether the Concordia Viking on July 12, 1970, was tender or stiff; is that correct?

A All I know is the draft you quoted to me of 21 feet and a few inches aft.

THE COURT: 21'8" forward and 23'2".

THE WITNESS: A difference of eighteen inches.

Q What does that indicate to you?

A It indicates that the trim was slightly by a drag of eighteen.

Q Drag of eighteen inches?

A Yes. And that I would expect a ship of 500 foot length or 495 feet, to have a summer draft of about 28 to 29 feet. I could look it up. But at any rate, she is six, seven feet below her marks. She is not loaded deep.

Q And the drafts I quoted to you on the 12,000 deadweight ton ship would indicate displacement of tonnage

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somewhere around 13,000?

A I don't see any deadweight scale on here.

Q It is approximately that.

A I would have to do a lot of imagining it.

Q In any event, that is a rather substantial mass, if you will, isn't that so?

THE COURT: Let's try to finish this witness.

MR. KAIN: I am just about concluded.

A I go back to my original contention --

THE COURT: Now look, Captain --

MR. KAIN: I have no further questions.

THE COURT: Do you have anything, Mr. Leonard?

MR. LEONARD: Three questions, your Honor.

RECROSS EXAMINATION

BY MR. LEONARD:

Q You sat here during the entire liability portion of this trial, didn't you?

A Yes.

Q You heard every witness testify? Every fact witness?

A Yes.

Q Tell me, who was the witness that testified that any container struck or bumped --

THE COURT: Now, Mr. Leonard, that's just

argumentative. You can argue with the jury when the case is all over what evidence is in or isn't in.

We will have to wait for that.

MR. LEONARD: All right.

Q In arriving at your conclusion, Captain Ash, did you choose to disregard the testimony of Mr. Picinich who said that one container did not bump or strike the other?

THE COURT: That's exactly what I was trying to get you to leave out. You can argue that to the jury later.

MR. LEONARD: No further questions.

THE COURT: You may step down.

(Witness excused.)

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rd/lf/302

ANTON PISINICH

vs.

CHRISTIAN HAALAND & SOENNE-SAITTEL STEAMSHIP COMPANY, INC.

71 Civ. 5337

SKIBS A/S SAMUEL BAKKE

vs.

JOHN W. MC GRATH CORPORATION

October 14, 1975

WILLIAM LANGAN, called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows.

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Langan, will you tell us, sir, where do you live?

A I live at 12 Jackson Place, Moonachie, New Jersey.

Q New Jersey?

A That's right.

Q What is your present occupation?

A I'm a hatch boss and foreman for John W. McGrath at pier A, Hoboken.

Q Pier which?

A Pier A, Hoboken.

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Q Hatch boss and what?

A Foreman.

Q Will you tellus a little bit about what that means?

A Well, it is the responsibility of leading men in the discharge of cargo on and off ships.

MR. LEONARD. I object to this witness testifying to what may be a legal conclusion.

THE COURT: Overruled.

Q For how long had you occupied the position of being hatch boss and foreman at whatever pier or any different pier, but in that position?

A For the last 27 years.

Q And did you do other longshoreman work before you became the hatch boss and foreman?

A I was a longshoreman for 22 years, yes.

Q How many years have you been hatch boss?

A Altogether, my arithemtic is a little bad. It sounds bad but it isn't really. Altogether I'm in the business 43 years. In the middle of that there was five years of an overlap where I was a longshoreman and a hatch boss.

Q Talk a little more slowly.

Mr. Langan, can you tell me how old you are?

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A 59 November 15th.

Q You have been working on the docks over 40 years?

A Yes.

Q Now, these last 27 years in the supervisory position, has that been all at these piers in Hoboken?

A Yes, A, B and C.

Q Do you generally work one pier and only rarely another or is it interchangeable?

A It is interchangeable.

Q The last 20 years for McGrath?

A Approximately, yes.

Q Now, back in July of 1971 then, I take it, you were a hatch boss foreman for J.W. McGrath Corporation at the Hoboken piers?

A Correct.

Q Now, can you tell me, sir, from time to time over the years you have been in this service or work, had you ever had occasion to either onload or offload, to deal with the Concordia ships?

A Yes. For the last five years and then 20 years ago for about two years.

Q Now, I used the phrase "Concordia ships." Are there more than one, the same type or is there just one?

A They have several ships but they also have several ships that are chartered and then assume the name Concordia until they go off charter.

MR. KAIN: I object to this testimony about charters and all. This witness couldn't possibly know whether a charter was in existence unless there has been a foundation laid. I ask your Honor to have the witness not testify.

THE COURT: I'm sure it is a preliminary matter. Let's not have a big thing about it.

Q These ships that you mention as the Concordia ships, are they different or are they all like liberty ships or certain kinds of ships where they are essentially the same class of ship, each one having a different name though?

A Essentially the same.

Q So did you have occasion to work on more than one of the Concordia ships that more or less were the same, each one with a different name?

A Yes. I worked on all the Concordia ships that came to Hoboken.

Q You can give it to us 20 and 40, between two and four, but you give us your idea. On about how many different occasions did you have the occasion of working, either on-

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loading or offloading, a Concordia ship?

A Oh, for the last four and a half years on an average of maybe five or six times per month.

Q That is 60 a year and that is over 200 times, let's put it that way; is that correct?

A Yes.

Q Now, in your position as hatch boss and foreman, can you tell me how many men generally are working under your supervision?

A Oh, anywhere from eighteen to 22.

Q And does this apply whether it is onloading or offloading?

A Yes.

Q Some of those men, are they employed on the ship itself?

A Yes.

Q Now, on June 12th of 1971, when the Concordia Viking was in the port of New York in the Hoboken pier, can you tell me, sir, were you employed on that vessel?

A Yes. My gang was in number four hatch.

MR. KAIN: Counsel is using the wrong date. It is July 12th. He is also leading the witness.

MR. FRIEDMAN: What did I say?

MR. KAIN: You said June.

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MR. FRIEDMAN: I apologize to everybody. July 12th.

Q You started to answer. You were doing what?

A My gang, the gang I was in charge of was in number four hatch on the Concordia Viking.

Q Mr.Langan, as best you recall, what kind of cargo, if any, was there on the deck of this vessel that day?

A On the deck of this vessel there were containers.

Q Now, will you tell us, sir, as you best recall how was the vessel positioned in terms of inshore, offshore, which side to what?

A I think what you are trying to get is she was port side out.

Q Port side out.

A Starboard side was to the pier.

Q Thank you very much. Were there men, other longshoremen, working at different hatches or was only the number four hatch being worked?

A I was working on number four and another gang was in number five hatch.

Q Do you happen to remember the name of the man in charge, in your position, at the number five hatch?

A Mike Santoro.

Q Tell me something, Mr. Langan, sometimes the men

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who are doing the work, is there a phrase like Santoro's gang or Langan's gang, are they sometimes referred to that way?

A Yes.

Q Now, were ship's equipment, booms, et cetera, being used for the offloading of this deck cargo?

A Yes.

Q Did you see anything happen that was out of the ordinary, so to speak, back behind you, in back of the area of number five hatch?

A Yes, I saw a container being lifted --

Q Let me just square away with the question for the record. Mr. Langan, you tell us what it is you saw as best you recollect it.

A Well, the first thing that attracted my attention was they picked a container up and it hit another container and I saw a man on the top go over the side of the ship.

THE COURT: You have to speak a little slower. Let's have it read over again.

(Answer read)

Q If you can throw your memory back to it, Mr. Langan, can you give us the best description you can of the manner of this man, as you used the phrase, going -- did you

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say over the top or something?

A Over the side.

Q Over the side. Can you describe that picture a little more for us?

A Well, when the container hit the other container he sort of like backed up to catch his balance and didn't catch his balance. He was that close to the edge of it at the time. As he went back he went over the side. As he was going over the side he was waving his arms and falling off balance and into the water he went.

Q Let me ask you, could you see the actual moment of contact with the water?

A No, I could not.

Q You saw him going over --

A I saw him going over the side.

Q What did you observe, if anything, with respect to what happened to the container that this man had been standing on and from which he lost his balance?

A When they picked it, from what I could see, they picked it up and the forward end of that container, pointing to the forward end of the ship, came around. When she came around she hit the forward end of the container on the outside which he was standing on, and hit it. When she hit it, this container went out, this part went outboard and this

part came aboard. She went exactly straight across the ship.

Q There was a container being lifted you told me; right?

A It hit.

Q First follow me. There was a container being lifted?

A Yes.

Q It in turn struck another container?

A Yes.

Q Just so I am clear. The container on which --

MR. LEONARD: I think on direct examination counsel should not be permitted to recapitulate.

THE COURT: Sustained.

The witness has testified and we don't have to have it summarized.

Q The container on which the man was standing before he fell overboard, was that the one that was being lifted or --

A No.

Q Now I am asking you, if I may, where did the container on which he had been standing finally end up? What was its location after this was all over?

A It was skimbo, not in a straight line. It was

knocked out of line. It sat on top of the two containers underneath it.

Q On which two containers, as best you can remember was the one that had been struck, the one he had been standing on? On which was it finally sitting?

A There were four containers. When this was lifted off this went akimbo and she rested across this (indicating).

Q When you say across this, so we have it for the record, can you tell me this: the two containers on which this container was now, so to speak, sitting --

A The two containers that were on the deck.

Q And were they both inboard, both outboard, inboard and outboard, you tell us.

A Inboard and outboard. One alongside the other.

Q So that part of it was on the inboard container?

A Yes.

Q Now, what, if anything, Mr. Langan, did you do after what you already told us you observed, the man going overboard?

A When I saw the man go overboard, I ran to the side of the ship where he was. I saw him swimming about or thrashing about in the water. At the same time the people that were working with him and his own hatch boss had already

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gone to the side and they had already thrown over a life ring and whatever else he could grab on to keep himself afloat. When I saw that I walked away and went back to my own job.

Q And what work had your gang been doing just before this accident occurred?

A Well, we were in the deck of the ship discharging general cargo.

Q And where were you discharging it to?

A To the dock.

Q Which was on the inshore side?

A Correct.

Q If you know, Mr. Langan, was there any similar work being done at number three or number two or number one hatches?

A More than likely there was.

MR. KAIN: If your Honor please, I object to the witness testifying more than likely, unless the witness was a witness to it.

THE COURT: Overruled.

Q Is that your best recollection?

A It is my best recollection, yes.

Q Now, can you tell us a little, sir, as to how the labor generally of the rooms and the lifting and moving

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equipment was with the Concordia Viking starboard side inshore and we have been using this rough sketch, this being the number five hatch. Assume the number four, three, two and the one going up. Can you give us the general layout of the booms and the lifting equipment as it was in operation on this morning?

A As this happened on pier B and we have a very narrow string piece there, we usually use, in fact we almost always do, with very rare exception, use what we call a house fall. And that takes care -- we only use one boom then on the ship. We use the two winches on the ship. We run a wire from the ship up to the top of the house into a block, back down and then joined together with a fall that is coming out of the boom being used on the ship.

Q Is this generally so, then: for each of the hatches is this or does it vary?

A On pier B this would be the general rule.

MR. KAIN: Your Honor, please, I object to the witness testifying as to the general rule.

THE COURT: Overruled.

Q Now, Mr. Langan, with that layout, and I am not going to it at length with you because other witnesses have described house fall and just what those words mean. Starboard to or towards the inshore side, can you tell me, what I

would call the lay of the land, I would call it that if it wasn't a ship. What was the condition of the ship and the ship's deck while these offl[illegible]ing operations were going on in the manner you mentioned?

A When the ship came in it had containers on it. They were taken ashore. They were already off. I don't know how many were by number five hatch. There were a couple by number four and they were taken ashore.

Q Talk a little slower so we can absorb it.

Now, the booms were in which direction? Were they hanging offshore to the port side, hanging in the direction towards the shore starboard side or what?

A Well, the boom to do that job there, and I'm sure it was set that way, the boom would be in the forward end of the hatch and it would be spotted over the port deck, directly over the work that is there.

MR. KAIN: Your Honor, please, unless this witness is going to testify as to where they were actually at the time of the accident, I have an objection. Where they would be I submit to your Honor is not testimony as to where they were.

THE COURT: Agree. Do you recall where they were?

THE WITNESS: Yes.

THE COURT: When you say "would be," it is just a

manner of speaking?

THE WITNESS: Yes.

THE WITNESS: The upper boom was spotted on the offshore deck.

Q And the weight of the cargo in the course of it being lifted and offloaded went in which direction, on the Concordia Viking as these five hatches were being worked?

A Well, it would have to be picked up anywhere from two inches and then taken inshore with the two falls.

Q Now, that offloading work that was under way at this time, what effect, if any, did it have on how this ship sat in the water at this time?

A Well, most of these ships, and I would say all of them --

THE COURT: Now, look, you are being asked to testify as to your memory of what occurred.

THE WITNESS: All right, sir.

THE COURT: Not as to a theory of what it might be or what it generally might be. Now, do you remember how the ship sat on that day?

THE WITNESS: Yes. I would say on this particular ship on this particular day --

THE COURT: You would say. Do you remember?

THE WITNESS: Yes.

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THE COURT: What is your memory?

THE WITNESS: An inshore list.

Q Will you tell us what you mean when you say inshore list?

A That the ship would bend over toward the pier.

Q In this case the starboard side?

A Right.

Q Now, can you tell us, if the Court will permit it, from your experience of 27 years and all the other years, what was it that gave rise to, that caused the inshore list on the Concordia Viking on the morning of July 12th?

MR. KAIN: I object to this witness unless he is qualified in advance to testify in trim and stability of ships. I don't think the fact he may have been a longshoreman for 27 years qualifies him either as a ship's master or an authority on trim and stability and I object to his testimony without a proper foundation being laid.

MR. FRIEDMAN: I don't want to take the time but may I point out he testified he is 43 years a longshoreman and 27 years in a supervisory position.

THE COURT: I will overrule the objection.

Q Mr. Langan, the question before you is: can you tell us what gave rise, in your opinion, from your experience,

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to the inshore list that was present?

A Well, a lot of times in other parts of the ship unbeknowns to the people in the hatches as we are going along, we are using machinery, hilo machines, or at another point there might be a heavier case being lifted on the inshore side, or a jumbo boom swinging on the side of the ship away from where we are which is what causes the ship to go into a list. Plus the fact that these ships are very tender ships. Tender meaning that they go at the slightest little variation of weight from balance. They go.

Q You say "these ships." Which ships?

A The Concordia ships.

MR. KAIN: I object to this testimony, your Honor, for the same reasons, on the grounds that this witness is now testifying as to matters of trim and stability involving metacentric heights, centers of gravity and I submit to your Honor there is nothing in his background as a working longshoreman that should permit him, without some other qualifications unbeknowns to me, to testify to these matters.

THE COURT: Overruled.

Q With respect to the responsiveness, the tendency of the ship to have this movement or tilt, have you worked on many other kinds of ships than the Concordia ships?

A Yes.

Q And this matter of whether a ship does or doesn't have this tilt or list and what does it, did it vary on different kinds of ships?

A Yes.

Q As a longshoreman, particularly one in charge of eighteen or 22 men doing this lifting and rig work, is that something that is of concern to you in considering the going on of the work?

A Yes, by all means. Then we have to rig our ship accordingly.

Q A little slower.

A We have to rig our ship, being aware of the list. In other words, if we say we want a boom offshore, we have to bring it off as far as we can to let it go in on its own on a drift, on a tilt.

Q Now, in your experience, and I think you told us that you either onloaded or offloaded the Concordia type of ships over 200 times, can you tell us, is that the basis of your statement you made a few minutes ago?

A Yes. I have been on all of their ships and every one of them will do the same thing.

Q Now, Mr. Langan, what time did you come to court this morning?

A I got here some place around a quarter to ten.

Q Did you hear any part of the testimony of a Captain Ash?

A No, I did not.

Q Did you talk to a Captain Ash?

A Captain Ash? No, I did not.

Q Do you know who he is?

A No, I don't.

Q Were you told anything about what a Captain Ash or anybody else testified to?

A No, I was not.

Q During the lunch hour, did I go out with you or spend any time with you?

A No, you did not.

Q Did Mr. Heller?

A No, he did not.

Q Was there any conversation or discussion between you and Mr. Heller or me with respect to what testimony, if any, had been given by Captain Ash this morning?

A None whatsoever.

Q Did I tell you specifically I didn't want to discuss it with you?

A That is right, you did.

Q Mr. Langan, when was the first time that you told

Mr. Heller or me or any representative that you had some personal or eyewitness knowledge as to the happening of this accident?

A This past Saturday afternoon. A very good friend of mine happened to have a case and Mr. Heller is handling it. He asked me to come in as a witness to it and to give a statement or a deposition to Mr. Heller, which I gladly did. In the course of the conversation this particular accident came up, and rather laughingly I said that I remember seeing that guy go over the side because it is something you rarely see in our business and you can laugh at it if it is not you. That is generally how I got mixed up with this case.

Then Mr. Heller called me later on and he said that you might want me to come as a witness.

Q On Sunday did I call you?

A Sunday you called me. We had a small conversation. You called me back. You said you didn't want to interfere with my football game. You called me back later on and we made arrangements for me to be here today.

Q Now, Mr. Langan, since July 12th of 1971, have you been requested or questioned about the happening of this accident or asked to be a witness concerning it by any representative of the shipowner or their attorneys?

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A No one.

Q Any representative or attorney on benalf of J.W. McGrath Corporation?

A No.

Q And throughout these years, which is now a little over four years, have you been more or less regularly employed by J.W. McGrath?

A Yes.

Q Now, at the number four hatch of the Concordia Viking on July 12th, 1971, did you tell us, and correct me if I am wrong, that you were moving or had to offload cargo containers?

A Yes. We took some containers off the deck, yes.

Q Were they different or the same, essentially, as the cargo containers that were alongside the number five hatch?

A In proportion the same. Maybe a little lighter, maybe a little heavier, I don't know.

Q And did the vessel forward have more cargo containers?

A Yes.

Q Now, had you offloaded cargo containers of a similar size and nature on occasions before July 12, 1971?

A Yes.

Q Many times in your experience?

A Many times.

Q Now, sir, as best you recollect were there any stacking devices employed at the cargo containers at the number four hatch, alongside the number four hatch?

We wouldn't need them there. We were only one high there.

THE COURT: I didn't hear the answer.

THE WITNESS: We wouldn't need them there because we were only one high.

Q Are you familiar with stacking devices?

A Yes, I am.

Q What is this (indicating)?

A A stacking device.

Q Exhibit 11. What is the function of a stacking device in this setting?

THE COURT: We have heard that.

MR. FRIEDMAN: I agree, your Honor.

THE COURT: We have heard that endlessly.

MR. FRIEDMAN: I would like to approach the bench for an indication that might shorten my examination.

THE COURT: All right.

(At the side bar)

MR. FRIEDMAN: Judge, I would ordinarily, but as

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the Court has already pointed out we have covered it with at least one other witness quite endlessly, evoked from this witness that it is usual and customary practice to use the stacking devices precisely to restrain a second tier container from moving in the event it does get bumped, et cetera.

If I don't ask those questions --

THE COURT: Look, I haven't any objection. The only thing is that as far as the general purpose, the physical purpose of a stacking device, that is apparent. Now it seems to me you are entitled to bring the idea of stacking devices closer to home, so to speak, to these vessels in this particular setting. If he can then throw any light on whether they would be used or were used on the Concordia ships with this kind of load, I don't see any problem with that. I mean as long as he is qualified. You take it one step at a time.

MR. FRIEDMAN: On the record and off, he is the most qualified guy in this courtroom, with all due regard to Captain Ash.

(In open court)

BY MR. FRIEDMAN:

Q Mr. Langan, let me ask you this: did you go over to the number five hatch, port side area, where this accident occurred, and in any way look at the matter of what,

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if anything, existed between the first and second tier containers that were there?

A Yes, I did.

Q Will you tell us what you observed or didn't observe?

A There were no stacking devices between the containers that were stowed two high.

THE COURT: T-w-o high; right?

THE WITNESS: Right.

Q Can you tell me, a container of this nature, and we won't go over it, being lifted -- take a look at this if you would, at this sketch, and assume the number four container is being lifted. It bumps against the number three container. If there are no -- I am talking about the second tier. If there are no stacking devices between the number three container and similar identical container immediately below it, is that number three container in a stable position?

A You are talking about them both sitting on the deck?

Q I am talking about the number three container that is on the second tier. Underneath it is a container which we are calling number seven for our purposes.

A Now I follow you.

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Q How three is on top of number seven. No stacking devices have been inserted between seven and three above it. This is immediately alongside of three, also second tier and it is lifted off. In fact I want to ask you a question about it. When it is lifted off, does it have four hooks from the top of it leading to a center hook?

A Yes.

Q Now I want to ask you this question: That hook, where did it run to on the Concordia Viking on July 12, 1971? What did it come down from?

A Comes down on the fall from the boom, from the up and down boom.

Q What I am trying to find out is, that boom, which is a pole; right?

A Yes.

Q How high is the top of that boom from which that line comes down to the hook before it spreads to the four hooks? What is the length of that wire?

A That would be purely a guess but I would say maybe fifteen to 20 feet.

MR. KAIN: I have an objection to any guesses, if your Honor please.

THE COURT: Yes, we won't have any guesses. What is your best estimate?

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